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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~217.~~ 28

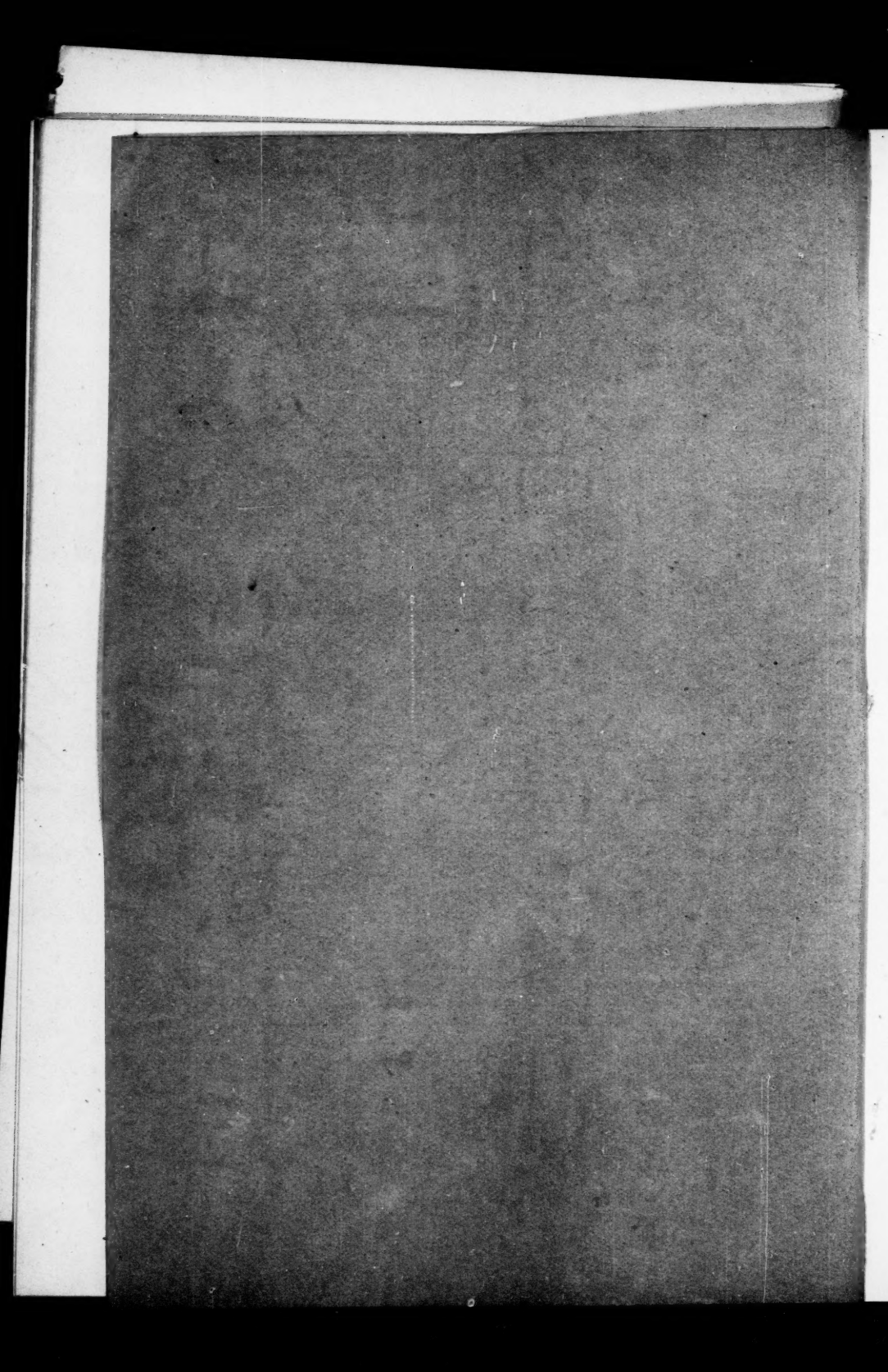
RICHARD A. ROBINSON AND SALLIE J. ROBINSON, HIS WIFE, PLAINTIFFS IN ERROR,

vs.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

**FILED MAY 1, 1880.**



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1 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1879, at the United States court-house, in the city of Memphis, in said district, on, to wit, the day of , A. D. 18 , in the following cause, to wit:

RICHARD A. ROBINSON AND SALLIE J., HIS wife, plaintiff,
*vs.*
THE MEMPHIS AND CHARLESTON RAILROAD Company, defendant.
No. 2611.

2 RICHARD A. ROBINSON AND SALLIE J. Robinson, his wife,
*vs.*
THE MEMPHIS AND CHARLESTON RAILROAD Company.

In the circuit court of the United States for the western district of Tennessee, sitting at Memphis.

Richard A. Robinson and wife, Sallie J. Robinson, who are citizens of the State of Mississippi, complain of defendant, the Memphis and Charleston Railroad Company, a corporation duly incorporated under and by virtue of, and who is a citizen of, the State of Tennessee, of a plea that it render to the said Richard A. Robinson and Sallie J. Robinson, who is his wife, the sum of ($500) five hundred dollars, which it owes to them and unjustly detains from them. For that, whereas, heretofore, to wit, on the 22d day of May, 1879, the said Memphis and Charleston Railroad Company was a common carrier, duly authorized to and carrying on
3 the business of carrying passengers and freight for compensation. That on, to wit, said 22d day of May, 1879, the plaintiff Sallie J. Robinson, then and now the wife of plaintiff Richard A. Robinson, wishing to be carried from Grand Junction, Tennessee, to Lynchburg, Virginia, purchased tickets entitling her to be so transported and carried by the various railroads between said points. That the tickets so purchased by her entitled her to first-class passage, and to all the privileges of all passengers travelling over said lines of railroads, and by the issuance of such tickets the various railroad companies upon the line between Grand Junction, Tennessee, and Lynchburg, Virginia, bound themselves to give the said Sallie J. Robinson all the privileges of a first-class passenger and all the rights to which any person traveling over said roads might, as such traveler, be entitled. That under and by virtue of an act passed
4 by the Congress of the United States March 1, 1875, entitled "An act to protect all citizens in their civil and legal rights," the said

Sallie J. Robinson was "entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of any race and color, regardless of any previous condition of servitude." That being so entitled as above, both by the tickets so purchased and by the act of Congress above referred to, to all the privileges that passengers might be entitled to, the said Sallie J. Robinson got upon the train of the Memphis and Charleston Railroad Company at Grand Junction, Tennessee, that railroad being one of the railroads over which the tickets so purchased
5 by her entitled her to be transported as aforesaid from Grand Junction to Lynchburg, and attempted to go into the ladies' car, the same being a car provided for the transportation of ladies and first-class passengers by said Memphis and Charleston Railroad Company, when she was refused admittance into the same by the conductor of the train, in whose charge the train was. That the said conductor, in refusing the said Sallie J. Robinson admission into the said ladies' car, took her by the arm and jerked her roughly around and excluded her therefrom. That by the 2d section of the said act of Congress of March 1, 1875, "Any person who shall violate the foregoing section of denying to any citizen except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privi*l*ges in said section enumerated, or by aiding or inciting such de-
6 nial, shall for every such offence forfeit and pay the sum of ($500) to the person aggrieved thereby, to be recovered in action of debt, with full costs." That the said Sallie J. Robinson was excluded from said ladies' car without any legal reason by the conductor of the train, who was the agent of said Memphis and Charleston Railroad Co., and was thereby denied the full enjoyment of the accommodations, advantages, facilities, and privileges to which she was entitled by virtue of the tickets so purchased by her and the act of Congress above referred to. Wherefore she was damaged ($500) five hundred dollars, and therefore plaintiffs sue.

WM. M. RANDOLPH,
*Att'y for Plaintiffs.*

(Endorsed:) No. 2611. United States circuit court, western district of Tennessee. Richard A. Robinson and Sallie J. Robinson v. Memphis & Charleston R. R. Declaration. Filed July 16, 1879. B. W. Etheridge, clerk. H. E. Andrews, d. c.

7 The President of the United States of America to the marshal of the western district of Tennessee, greeting:

You are hereby commanded to summon the Memphis and Charleston Railroad Company, a corporation and a citizen of the State of Tennessee, if to be found within your district, to appear before the judge of the circuit court of the United States for the western district of Tennessee, at Memphis, in said district, on the fourth Monday in November next, and then and there to answer Richard A. Robinson and Sallie J. Robinson,

his wife, who are citizens of the State of Mississippi, in a plea of debt to the damage of the said plaintiffs (as they say) of five hundred dollars.

Herein fail not, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court,
8 at Memphis, this 16th day of July, A. D. 1879, and the 104th of American Independence.

[L. S.] H. E. ANDREWS,
*D. Clerk.*

Know all men by these presents that we, Richard A. Robinson and W. P. Lipscomb, as surety held and firmly bound unto said defendant, the Memphis and Charleston R. R. Co., in the sum of two hundred and fifty dollars; but to be void on condition that the said plaintiffs do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiffs in the circuit court of the United States for the western district of Tennessee, at said Memphis, against the said defendant, on failure of the said plaintiff to prosecute the said suit to effect.

Witness our hands and seals this day of , A. D. 1879.

R. A. ROBINSON. [SEAL.]
W. P. LIPSCOMB. [SEAL.]

9 Approved and acknowledged before me the 10th day of July, A. D. 1879.

M. J. TURNER,
*J. P., Fayette Co., Tennessee.*

(Endorsed:) No. 2611. Richard A. Robinson and wife vs. M. & Ch. R. R. Co. Summons. Returnable to November term, A. D. 1879.

MEMPHIS TENN., *July* 18, 1879.

I received summons herein on 18th day of July, 1879, and at Memphis, Tenn., and on the 18th day of July, 1879, I served the within named, the Memphis and Charles. Railroad Company, by reading and making known the contents hereof to S. R. Cruise as secretary and treasurer of the said Memphis and Charleston Railroad Co., and at same time and place personally served upon him a certified copy of declaration in this case.

M. T. WILLIAMSON,
*U. S. Marshal.*
By J. W. RAMSEY, *Deputy.*

Serv. sum., 2.00; serv. dec., 2.00; 2 m., 0.12—$4.12.

Returned 6th day of Nov., A. D. 1879. Bell W. Etheridge, clerk. W. B. Weisiger, d. c.

10 In the circuit court of the United States.

RICHARD A. ROBINSON AND SALLIE J., HIS wife,
*v.*
THE MEMPHIS AND CHARLESTON RAILROAD Company.

The leave of the court having first been had, the plaintiffs by way of an additional count in their declaration, herein allege and state:

That they are persons born within the United States of America, and are and always have been subject to the jurisdiction thereof, and are and at the several times hereinafter referred to were citizens of the United States, and citizens of the State of Mississippi, wherein they resided and still reside. The plaintiff Sallie was also formerly held in a state of slavery, not as a punishment for crime whereof she had been convicted, but has been emancipated therefrom by law and by the Constitution of
11 the United States. The plaintiffs also are persons of African descent. And by reason of the premises the plaintiffs at the times and places stated in the original declaration were entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of public conveyances on land and water, subject only to the conditions and limitations established and applicable alike to citizens of every race and color, regardless of any previous condition of servitude. And the plaintiff Sallie J. Robinson, being on the journey set forth in the original declaration, at the times and places therein mentioned, and having purchased and paid for a ticket entitling her to a first-class fare or passage over *to* the railroad of the defendant, as alleged in the *in the* original declaration, was denied by the defendant, for reasons not applicable by law to
12 citizens of every race and color, and regardless of any previous condition of servitude, but because, as before stated, she is a person of African descent, the full enjoyment of the accommodations, advantages, facilities, and privileges of the defendant's railroad and coaches, and the seats therein, which she had purchased and paid for as aforesaid, and to which the ticket held by her entitled her *to*, all as is more fully set forth and stated in the original declaration, to which reference is here made. And therefore the plaintiffs sue for and demand the sum of five hundred dollars from the defendant, to be forfeited and paid to them for the said offense, as provided in the act of Congress in that behalf in force, and full costs.

WM. M. RANDOLPH,
*Att'y for Plaintiffs.*

(Endorsed:) No. 2611. Circuit court of the United States,
13 western district of Tennessee. R. A. Robinson and wife v. M. & Ch. R. R. Amended count to declaration. Filed Jan'y 26, 1880. Bell W. Etheridge, clerk.

*Demurrer.*

Circuit court of the United States for the western district of Tennessee, sixth judicial circuit, November term, 1879.

RICHARD A. ROBINSON AND SALLIE J. ROBINSON
*vs.*
THE MEMPHIS AND CHARLESTON RAILROAD Company.

1. Comes the defendant, The Memphis and Charleston Railroad Company, by its attorney, and defends the wrong and injury when, &c., and says that the said declaration, and the amended court, and the matters

herein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law for the said plaintiffs to have or
14 maintain their aforesaid action hereof against the defendant, and that defendant is not bound by law to answer the same, and this the defendant is ready to verify; wherefor', by reason of the deficiency of said declaration in this behalf, the said defendant prays judgment, and that the plaintiffs may be barred from having and maintaining their aforesaid action thereof against the defendant, &c.

2. And the defendant, for a special ground of demurrer, shows that there is no allegation, either in the original count or the amended count, that the defendant committed the alleged wrong or that the conductor did it as agent of the company and in discharge of instruction and duty imposed on said conductor by defendant.

3. And also that the original declaration and the amended count fails to aver that the plaintiff Sallie J. Robinson was excluded from a first-class passenger car because of race or color or previous condition of servitude.

15 4. And also, because said declaration, original and amended count fail to negative that plaintiff Sallie J. Robinson was excluded from a first-class passenger car on some condition and limitation established by law applicable alike to citizens of every race and color regardless of any previous condition of servitude.

5. And also that the said declaration is in other respects uncertain, informal, insufficient, &c., and this the defendant is ready to verify; wherefore he prays judgment and that said suit be dismissed, &c.

HUMES & POSTON,
*Att's for Defendant.*

(Endorsed:) No. 2611. Richard A. Robinson and wife vs. Mem. and Ch. R. R. Co. Demurrer to declaration. Filed Jan. 26th, 1880. Bell W. Etheridge, clerk. Humes & Poston, att'ys for defendant.

16 *Pleas.*

Circuit court of the United States, western district of Tennessee, sixth judicial circuit, November term, 1879.

RICHARD A. ROBINSON AND SALLY J., HIS wife,
*vs.*
THE MEMPHIS AND CHARLESTON R. R. CO.

1ST PLEA.—And the said defendant, by attorney, comes and defends the wrong and injury, when, &c., and says it does not owe the said sum of five hundred dollars in manner and form as the said plaintiff hath thereof complained above of this defendant, and of this defendant puts itself on the country.

HUMES & POSTON,
*Att's for Def't.*

2D PLEA.—And the defendant, by attorney, comes and defends the wrong and injury, when, &c., and says it is not guilty of the supposed

grievances above laid to its charge, or any or either, or any part thereof in manner and form as the said plaintiff has above thereof complained
17 of the defendant, and of this the defendant puts itself upon the country.

HUMES & POSTON,
*Atto's for Defendant.*

3D PLEA.—And the said defendant, by attorney, comes and defends the wrong and injury, when, &c., and, for further plea, says that the plaintiff, Sallie J. Robinson, was not refused admittance to nor excluded from the ladies' car of the defendant's train as alleged, but, on the contrary, she went into said ladies' car and occupied a seat in the ladies' car to the end of her trip on defendant's route to Chattanooga, and of this defendant puts itself on the country.

HUMES & POSTON,
*Att's for Defendant.*

The plaintiffs take issue on each one of the foregoing pleas.

WM. M. RANDOLPH,
*Att'y for Plaintiffs.*

(Endorsed:) No. 2611. Richard A. Robinson and wife Sallie
18 J. vs. Memphis and Charleston R. R. Co. Pleas of defendant. Filed 26th day of Jan'y, 1880. Bell W. Etheridge, clerk. Humes & Poston, att's for def't.

19 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1879, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 26' day of Jan'y, A. D. 1880, in the following cause, to wit:

RICHARD A. ROBINSON ET AL., PLAINTIFF,
*vs.*
MEMPHIS AND CHARLESTON RAILROAD COMPANY, DEFENDANT. } No. 2611.

On this 26th day of January, 1880, the demurrers of the defendant to the original and amended declarations were heard by the court and overruled and disallowed. And the original and amended declarations adjudged to be sufficient in law and the defendant allowed to plead, and thereupon the defendant filed his 3 pleas to the declarations, original and amended.

20 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1879, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 27th day of Jan'y, A. D. 1880, in the following cause, to wit:

RICHARD A. ROBINSON ET AL., PLAINTIFF,
*vs.*
MEMPHIS AND CHARLESTON RAILROAD, DEFENDANT. } No. 2611.

In the above cause came the parties, by their attorneys, and on motion, it is ordered that a jury do come, and thereupon came a jury of good and lawful men, to wit, M. L. Davenport, L. T. Hart, John A. Fleece, J. L. Hall, J. H. Goodlett, J. J. Murphy, Jos. C. C. Tucker, Peyton Burchett, W. L. Marsh, T. Sherwood, William Dean, and C. A. Dammann, who being duly elected, tried, and sworn well and truly to try the issues
21 joined in this cause and a true verdict render according to the evidence, and thereupon the trial of said cause was commenced, and there not being sufficient time to conclude the same on to-day, it is ordered that said trial be continued till to-morrow morning at ten o'clock.

22 *Bill of ex.*

Circuit court of the United States, western district of Tennessee.

RICHARD A. ROBINSON AND SALLIE J. ROBINSON, his wife,
*vs.*
THE MEMPHIS AND CHARLESTON RAILROAD COMPANY.

Before a jury, Hon. E. S. Hammond, judge.

On the trial of this case the evidence on behalf of plaintiff tended to show that plaintiffs were both residents of the State of Mississippi, and that plaintiff Sallie J. Robinson, who is the wife of Richard A. Robinson, was a person of African descent, and had formerly been held in slavery; that on the night of 22d May, 1879, Sallie J. Robinson, in company with Joseph C. Robinson, her nephew, and also a person of African descent, purchased tickets over the various lines of railroads between Grand Junction, in the State of Tennessee, and Lynchburg, in the State of Virginia, entitling them to first-class passage to Lynchburg; that between
23 midnight and day they started to get upon the first train passing of defendant at Grand Junction, Tenn., it being one of the railroads over which their tickets entitled them to transportation; that the conductor of the train, as they started to go into the ladies' car of the

train, took Mrs. Robinson by the arm and stopped her; that by pressing her arm roughly it was bruised, and remained so for a week or so; that the conductor got in front of her and stood in the door of the ladies' car and closed it as far as his body would allow; that he told Sallie J. Robinson and Joseph C. Robinson they could not enter that car; that he was told they had first-class tickets, but he replied it made no difference; that they must go in the other car, pointing to the smoking-car, and that they went into that car; that the smoking-car was generally as comfortable as the ladies' car; that it was as warm and the seats as good,
24 but that it was dark, and she could not see whether it was clean, and was used by men for smoking, &c., but she saw no smoking while she was in there; that Mrs. Robinson wanted to go into the ladies' car, and did not want to go into the smoking-car; that smoke made her sick; that the ladies' car was not full; that immediately after the train had started the conductor came back to the smoking-car and examined the tickets and sat down. Joseph C. Robinson went to him to ask some question, and the conductor then said to him, Why do you people try to force yourselves in that car? speaking of the ladies' car. That Joseph C. Robinson replied they had first-class tickets and were entitled to ride in that car, and "she is my aunt." The conductor then said they could ride in that car, and could get in it at the next station, and that they did go in the ladies' car at the next station, which was Salisbury, Tennes-
25 see, after riding in the smoking-car for about 6 miles and for about 15 minutes. That after going in the ladies' car they continued to ride in it to the end of their journey; that Joseph C. Robinson and the plaintiff Sallie J. stopped at Knoxville on their journey to Lynchburg to complain of their treatment to Vice-President McGhee, and called on Mr. Ogden, the general ticket agent, not finding Col. McGhee at home, and Ogden suggested that he address a letter to John A. Grant, the defendant's superintendent, at Memphis, which he did.

The evidence on behalf of defendant was that Sallie J. Robinson was a young, good-looking mulatto woman about 28 years old, and that Joseph C. Robinson was a young man of light complexion, light hair, and light blue eyes. That the conductor, at the time of the exclusion from the ladies' car, which was at night, supposed the said Joseph C. Robinson to be a white man travelling with a colored woman. That the conductor
26 had been a conductor for a long time, and his experience as conductor was that when young white men travelled in company with young colored women it was for illicit purposes, and that white men so travelling with colored women generally conducted themselves in an improper manner and in a manner objectionable to other passengers. That he saw nothing objectionable in the conduct of either Joseph C. Robinson or Sallie J. Robinson, and that his only reason for supposing her to be an improper character was that she was a good-looking colored woman travelling with what he supposed to be a young white man. (The counsel for plaintiff objected to this evidence of what the conductor supposed and to his experience, because incompetent and irrelevant, and no excuse or justification of the defendant but the court overruled the objection, and the defendant at the time excepted.) That Joseph C. Robin-
27 son and Sallie J. Robinson were excluded from the ladies' car and directed to go into the smoking-car, and did so, and that after the

train had started the conductor went back to the car in which they were, saw their tickets, and asked Joseph C. Robinson, "Why did you *to* try to take that girl into the ladies' car." Robinson replied, "She is my aunt" and we have first-class tickets. The conductor then said, "She is your aunt; then you are colored too?" Robinson replied, "Yes, she is my aunt, and I am a colored man." Then the conductor said, "then you can take her into the ladies' car, but wait till we stop at the first station." And they did go into the ladies' car at the next station, which was Salisbury, Tennessee. That Salisbury was about 6 miles from Grand Junction, and it took about 15 minutes to run that distance. The conductor testified that the smoking-car was generally as comfortable as the ladies' car, the seats as good, &c., but that it was used by men to smoke in.

28 That the conductor caught hold of Mrs. Robinson's arm in stopping her, but did not think he hurt her. The conductor was asked in his examination by defendant how white men travelling with colored women generally conducted themselves. He answered they generally laughed, and drank, and smoked, and acted disorderly.

(This question and answer and all the testimony as to what was generally done by white men travelling with colored women was objected to by plaintiffs' counsel because incompetent and irrelevant, and the objection overruled, and exception taken to this action of the court by plaintiffs.)

The conductor was asked if he had ever excluded a white woman travelling with a white man on account of suspicion as to her character. He stated he had several times, and gave one instance, but that the woman, as he afterwards found out, was really a prostitute; that he supposed

29 Joseph C. Robinson was a young white man and that Mrs. Robinson was a colored woman, and that it was not usual for young white men to travel in this country or associate with young colored women unless there were improper relations existing between them, and seeing she was a handsome young colored woman, and believing Joseph C. Robinson a young white man, he suspected there were improper relations existing between them, and for that reason excluded her; that the railroad company had given no instructions to exclude on account of color; that any lady, white or colored, was entitled to go into the ladies' car, which was a car set apart for ladies and their escorts, and that Joseph C. and Sallie J. Robinson could have done nothing sexually improper in that car without being observed, but might have conducted themselves so as to be offensive to passengers; and that it a part

30 of the business of the conductor to see that nothing improper was done by them or the other passengers.

On cross-examination the plaintiffs' counsel asked the conductor "Why did you call Mrs. Robinson girl." The conductor answered, "I did not do so as a term of opprobrium, but it is customary in this country to call young colored women girls, and I did it from force of habit. I do not think every colored woman wanting in virtue, and I want you to understand that."

The letter written by Joseph C. Robinson from Knoxville, mentioned above, was produced and identified both by him and by the defendant's witness, C. W. Reagin, the conductor who excluded the said parties from the car, and who was the only witness examined on the part of the defendant as to the occurrences relied upon as the ground of action. A

31 letter written by John A. Grant, the defendant's superintendent, refer'ing the above letter to Conductor Reagin for his report thereon, and also the letter of Conductor Reagin making his report, were produced and identified. All the said letters were produced and read in evidence on the part of the plaintiffs, and are as follows:

KNOXVILLE, TENN., *May* 26, 1879.

JOHN A. GRANT, *Sup't M. & C. R. R., Memphis, Tenn.:*

SIR: Last Thursday morning, May 22d, as a lady and I attempted to get on the passenger car of the M. & C. R. R., due at Grand Junction at 3.10 a. m., and at which place we were to get on, the conductor refused to admit us in the ladies' car. Not only did he refuse admission, but took the lady by the arm and jerked her round very roughly, attempt-
32 ing to push her into another, and then closed the door in our faces, and said he would not allow us in that car. We had purchased round-trip tickets to Lynchburg (first-class of course), and after receiving such brutal treatment from the conductor, we feel ourselves very grossly insulted. The mark of violence upon the arm of the lady is itself sufficient evidence of the rough treatment received. We have stop'ed over at this place several days to see after this matter, but Pres. McGee is away, therefore I relate the particulars to you. We wish to give the road no trouble, but do think we are entitle' to better treatment while passing over your line, and if the managers cannot guarantee and see that we get better treatment, we will resort to other authorities. Let me hear from you immediately on this matter.

Very respectfully,

J. C. ROBINSON.

"MEMPHIS, TENN., *May* 28, 1879.

33 Referred to Cond'r Reagin with the request that he state the facts in this case and return this paper to the office as soon as possible.

Yours, &c.,

JNO. A. GRANT,
*Gen'l Sup't Board.*

MEMPHIS, TENN., *May* 29, 1879.

Capt. J. A. GRANT, *Gen'l Sup't:*

DEAR SIR: In regard to the complaint which J. C. Robinson, esq., (colored), prefers against me, I did at first refuse them admittance into the ladies' coach, but after seeing their tickets and having some talk with them, I told them that they could return to the car, which they did at Saulsbury. As to using any violence, that I deny, or doing anything that would have hurt a child.

Yours, resp'ly,

C. W. REAGIN, *Cond'r.*

34 The defendant proved by W. F. Taylor and Eugene Leidy, merchants of Memphis, that they had travelled a great deal on the Memphis and Charleston Railroad and frequently on trains in charge of

C. W. Reagin as conductor, and that he was uniformly polite, courteous, and accommodating towards passengers.

The foregoing being the substance of the testimony adduced, the court charged the jury as follows:

GENTLEMEN OF THE JURY: This is an action of debt for a penalty under the act of Congress known as the civil rights act. The constitutional validity of the act is not now before us for adjudication. For the purposes of this trial, the defendant concedes its validity and denies on the merits that the statute has been violated. Our only duty then is to construe the act on its application to the facts of this case. In doing this I feel confident that the court and jury are capable of following the
35 spirit of the act itself and will not deny to either the plaintiffs or defendant a just judgment because of any prejudice we may entertain either as white or colored men. We are to treat this case as we do any other, as one of law and fact, to be decided only by the law and the testimony, and will not permit any other consideration to influence our judgment. The law is blind to the color of the parties to a suit, and so must courts and juries be. The color of the plaintiff enters as an element into this controversy only because of the statute itself, and in considering it we treat it simply as a fact to influence our judgment in determining the legal rights of the parties and not as a fact to incline us to decide it the one way or the other. The object of the statute is to secure to col-
36 ored persons equality of right and privilege in the enjoyment of the accommodations mentioned by it. If a colored person be denied or excluded from any of these for a cause not applicable alike to citizens of every race and color and regardless of any previous condition of servitude, the person aggrieved may recover in an action of debt a penalty of $500 fixed by this statute for the violation of this equality of privilege. The gravamen of the action is exclusion from the full and equal enjoyment of the accommodations on account of race, color, or previous condition of servitude. No other cause of exclusion, however wrongful or unjust, is denounced by the statute, all other causes being left for redress to such other remedies as the law may afford to the party aggrieved.

(The plaintiffs at the time excepted to the next two preceding sentences of the charge.)

37 The motive of the defendant in making the exclusion is the sole test of the statutory offense, and it is always for the jury to say, as a question of fact, whether the defendant denied the accommodation on account of the plaintiffs' race, color, or previous condition of servitude, or on account of some other cause; and if the other cause be one applicable alike to persons of all races and colors and regardless of previous condition of servitude, the defendant cannot be liable for this penalty, however much he may be liable at common law for damages, if the exclusion be wrongful.

(The plaintiffs at the time excepted to so much of the charge as precedes this parenthesis, and follows the last preceding one, beginning with the words, "The motive.")

To excuse the defendant two things must concur under the terms
38 of the statute: First, the exclusion must not be on account of race, or color, or previous condition of servitude, and this is prohibitory. Secondly, the cause of exclusion must be applicable to all persons of every

race and color and regardless of previous condition of servitude, and this is permissive. Now, the court understands this to mean that the denial complained of must be exclusively on account of the plaintiffs' race, color, or previous condition of servitude. That must be the only cause. The statute does not apply if any other reason furnishes the motive for exclusion, let it be what it may. It may be frivolous, it may be cruel, it may be aggravated wrong in its most revolting form, yet it is not actionable under this statute.

(The plaintiffs at the time excepted to so much of the charge as precedes this parenthesis, beginning with the words "Now, the court understands.")

39 The statute does not give colored people a right of action for wrongful denial of accommodations because they are colored, but affixes a penalty for a particular offense, which is described as a denial of the accommodations on account of their color.

(The plaintiffs at the time excepted to the preceding sentence of the charge.)

If the conductor in this case had assaulted the plaintiff in the most brutal manner and maimed her, however seriously, it would not have aggravated the offence under this statute. It would have been the same as if he had excluded her from the car in the most delicate manner possible. In a common-law action for the assault or against the company for the wrong of its agent the question of color would be immaterial except as an aggravation of damages. Here the penalty is fixed, not as a

40 measure of damages for a common-law wrong, but, as a statutory forfeiture for a statutory offence; you will therefore, gentlemen, observe this distinction and remember that we are not trying this case under the common law in a suit for a violation of the company's contract to transport the plaintiff in a first-class car, nor for damages in wrongfully excluding her from that car. Nor is this a suit in which we can award the plaintiff damages because the conductor without just cause cruelly suspected her, according to his statement and the facts of this case, of being a prostitute travelling with her paramour. For these wrongs her only remedy is an action of damages. This is not an action for that wrong, but is a suit for a penalty prescribed by statute, and we are by the law limited to the description of the offence given in statute itself.

It is conceded that the plaintiff, a respectable woman of color,

41 had a ticket entitling her to first-class accommodations. That there was a ladies' car attached to the train from which she was temporarily excluded and compelled to sit in the smoking-car. If you find from the evidence that she was denied admission to this car because she was colored, or because she was of African, descent or because she had been a slave, the defendant is liable for the penalty. It does not matter that the conductor repented, and afterwards admitted her to the car. This would go in mitigation of damages if this were an action at common law, but under this statute the fact that she was subsequently admitted is immaterial if she was excluded at first solely on account of her color. But if you find from the evidence that at the time the admittance was

42 denied the conductor suspected her of being a prostitute travelling with a paramour and required them to remain out of the ladies' car until he could investigate that matter, and immediately on finding out his

mistake permitted her to occupy the ladies' car for the remainder of the journey, the company is not liable for this penalty.

(The plaintiffs at the time excepted to the preceding sentence of the charge.)

If you find from the evidence that the plaintiff was excluded from the ladies' car because the conductor in fact and in good faith believed that she was a prostitute travelling with her paramour, then, whether such belief was well or ill founded the company is not liable for this penalty.

(The plaintiffs at the time excepted to the preceding sentence of the charge.)

If ill founded, her remedy is not under this statute, but in some
43 other form of action, unless you further find that it was because she was supposed to be a colored prostitute that she was excluded, and that the same treatment would not have been applied to a white woman similarly suspected, in which case the statute would be violated.

(The plaintiffs at the time excepted to the preceding sentence of the charge.)

This statute does not permit a colored woman to be excluded from the accommodations mentioned because of her bad character, real or supposed, unless the company applies the same rule to white women of real or supposed bad character under like circumstances.

(The plaintiffs at the time excepted to the preceding sentence of the charge.)

So you see, gentlemen, that this case hinges entirely on the question of fact as to the cause of this exclusion. It is for you to determine
44 whether the conductor excluded the plaintiff solely because she was colored, or solely because he supposed her to be an improper character travelling under circumstances which excited his fears that she and her companion would so conduct themselves as to annoy the other passengers, impair their comfort, or in some way injure the business of the company.

(The plaintiffs at the time excepted to the preceding sentence of the charge.)

The carrier has the right to exclude persons guilty of improper conduct in the presence of other passengers, and he may, as I have already said, temporarily exclude persons on a mere suspicion that they will be disagreeable in their conduct till such time as he can satisfy himself that his suspicions are ill founded.

(The plaintiffs at the time excepted to the preceding sentence of the charge.)

If he excludes permanently on ill-founded suspicion there is a
45 common-law action for damages, but none under this statute for its penalty.

(The plaintiffs at the time excepted to the preceding sentence of the charge.)

If he excludes, whether temporarily or permanently, on account of color alone, he is liable for the penalty under this statute.

(The plaintiffs at the time excepted to the preceding sentence of the charge.)

In determining this question, you will look to the facts and circumstances in evidence before you for no other purpose than that of finding how the truth may be as to the reason or cause of the exclusion, so that you may say whether it was on account of plaintiff's being a colored woman.

(The plaintiffs at the time excepted to the preceding sentence of the charge.)

If you find from the evidence that the conductor supposed the plaintiff an improper character, because she was travelling with a man sup-
46 posed at the time to be a white man, and for no other reason whatever, you may look to the facts that she is conceded to be a woman of respectable character, that her companion was in fact a colored man, and that their conduct was irreproachable, as throwing light on the question of the conductor's motive.

(The plaintiffs at the time excepted to the preceding sentence of the charge.)

There is no presumption of law or fact that a colored woman travelling with a white man is a prostitute, and he her paramour. Yet if you find as a matter of fact, the conductor did believe they were improperly associated, and therefore improper characters, and for that belief excluded them, the defendant is not liable.

(The plaintiffs at the time excepted to the two preceding sentences of the charge.)

This statute does not punish a defendant for wrongfully and un-
47 justly suspecting a colored woman's virtue, but does punish a carrier for excluding from equal accommodations a colored person on account of her color.

(The plaintiffs at the time excepted to the preceding sentence of the charge.)

If you find the plaintiff was excluded on account of her color, race, or previous condition of servitude, your verdict should be, "We find for the plaintiff and in the sum of $500."

(The preceding sentence of the charge the plaintiffs at the time excepted to.)

If you find the exclusion was for some other cause applicable to persons of every race and color, and regardless of previous condition of servitude, your verdict should be, "We find for defendant."

(The plaintiffs at the time excepted to the preceding sentence of the charge.)

The plaintiffs asked the following instruction, which was given by the court:

If the jury believe from the evidence that the plaintiff Sallie J.
48 is a person of African descent, and was formerly a slave, and is the wife of the plaintiff Richard A., and in May, 1879, was and still is a citizen of the State of Mississippi, and was in the said month on a journey from the State of Mississippi to the State of Virginia, and had purchased, and paid for, and was possessed of a ticket entitling her to a first-class passage over the defendant's railroad in the lady's car of the defendant's train, then going east from Grand Junction, Tennessee, and that she offered to get upon the said car at Grand Junction at the proper time and place to go upon her said journey, and was refused admittance into the said car and was excluded therefrom by the conductor of the train, because she was African descent, then the jury will find for the plaintiffs.

The plaintiffs asked the following six instructions, each of
49 which the court refused:

No. 1. If you believe that the plaintiff Sallie J. Robinson was

excluded from the ladies' car because she was a colored woman, travelling with a white man, and that the conductor believed she was such colored woman, and believed that she was travelling with a white man, it furnishes no ground for such exclusion, as there is no law to prevent a white man and a colored woman travelling together, and such exclusion would simply be an exclusion on account of race, there being no presumption of law that whenever a white man and a colored woman travel together there exists any improper relations between them.

(To the refusal of the court to give the foregoing instruction the plaintiffs at the time excepted.)

No. 2. If you believe from the evidence that the plainitff Sallie
50 J. Robinson was excluded from the ladies' car, and that the same was in any way *in*ferior to the car into which she was forced to go, then this was a denial of a general right to which the plaintiff was entitled, and judgment must be rendered against the defendant.

(To the refusal of the court to give the foregoing instruction the plaintiffs at the time excepted.)

No. 3. If you believe that the plaintiff Sallie J. Robinson was excluded from the ladies' car simply because the conductor believed that she was a colored woman, and believed Mr. Robinson was a white man; and from this simple fact of his supposition that they were so of different races, he believed they would be guilty of improper conduct, then this would be no reason for such exclusion in the sense of the act of Congress, as before they were guilty of this supposed bad conduct the conductor could
51 not assume that they would in the future be guilty of improper conduct. That, therefore, the exclusion at the time amounted only to an exclusion on account of race, and plaintiff is therefore entitled to recover.

(To the refusal of the court to give the foregoing instruction the plaintiffs at the time excepted.)

No. 4. If the jury believe, from the evidence, that the plaintiff, Sallie J., is a person of African descent, and was formerly a slave, and is the wife of the plaintiff Richard A., and in May, 1879, was and still is a citizen of the State of Mississippi, and was in the said month on a journey, in company with Joseph C. Robinson, also a person of African descent, from the State of Mississippi to the State of Virginia, and that she had purchased and paid for and was possessed of a ticket entitling her to a first-class passage over the defendants' railroad, in the lady's car of the defendants' train, then going east from Grand Junction, Tennessee, and that the said
52 Sallie J. attempted to get into the said lady's car, at Grand Junction, at the proper time and place, in order to proceed upon her said journey, and was refused admittance into the said car, and was excluded therefrom by the conductor of the train because the conductor erroneously supposed the said Joseph C. Robinson, in whose company the said Sallie J. was travelling, was a white person, not of African descent, and suspected, from the fact that she, the said Sallie J., a woman of African descent, was travelling in company with such supposed white man, that improper relations existed between them, and because of such suspicion, and for no other reason, refused admittance to and excluded the said Sallie J. from the said car, then the jury will find for the plaintiff.

(To the refusal of the court to give the foregoing instruction the plaintiffs at the time excepted.)

53 No. 5. It is no sufficient reason to impute a want of virtue to a woman of African descent that she is travelling in company with a white man on the cars of a railroad. And the defendant's conductor was not justified in suspecting or concluding from the fact that the plaintiff Sallie J. was a colored woman, and the supposition (even taking it to be true) that Joseph C. Robinson was a white man, and the circumstances that the two were travelling together, that the plaintiff Sallie J. was a woman without virtue, or that improper relations existed between her and the said Joseph C. And if the jury find from the evidence that the defendant's conductor did entertain the suspicion that improper relations existed between the said Sallie J. and the said Joseph C., and that such suspicion was based on the circumstance that he believed the one to be of African descent and the other to be white, then such suspicion was

54 no sufficient reason in law for excluding the said Sallie J. from the lady's car of the defendant's train; and if the jury find from the evidence that the conductor excluded her from such car because of the said suspicion, then the jury will find for the plaintiffs.

(To the refusal of the court to give the foregoing instruction the plaintiffs at the time excepted.)

No. 6. If the jury believe from the evidence that the plaintiff Sallie J. was possessed of a first-class ticket entitling her to travel in the lady's car of the train on the defendant's railway, and that when she attempted to go into the said car she was refused admittance thereto and excluded therefrom by the conductor of the said train, the burden of proof is upon the defendant to show that the plaintiffs' right to enter and travel in the said car was denied her for a sufficient reason applicable by law to citi-

55 zens of every race and color, and regard'ess of any previous condition of servitude; and if the defendant has failed to prove affirmatively by the evidence such sufficient reason, the jury will find for the plaintiffs. And if the plaintiff Sallie J. was a decent person, and conducted herself with propriety, no suspicion of the conductor of the defendant's train that she was a virtuous woman, whether such suspicion was without foundation, or based upon circumstances appearing to justify it, could warrant him in refusing her admission to the lady's car of the defendant's train, if she had purchased and paid for and held a ticket entitling her to such admission.

(To the refusal of the court to give the foregoing instruction the plaintiffs at the time excepted.)

The defendant asked the following five instructions, each of which the court gave:

56 *Instructions asked by defendant.*

RICHARD A. ROBINSON AND SALLIE J. ROBINSON
*vs.*
THE MEMPHIS AND CHARLESTON R. R. CO.

No. 1. 1st. That to entitle the plaintiffs to recover the proof must satisfy the jury that the defendant excluded Mrs. Sallie J. Robinson from a first-

class car because of her being a colored woman of African descent, or a former slave.

(To the giving of the foregoing instruction the plaintiffs at the time excepted.)

No. 2. 2d. If the testimony shows that the conductor excluded her from the ladies' car because he thought she was an improper character, although there was no actual foundation for his suspicion, the jury must find for the defendant.

(To the giving of the foregoing instruction the plaintiffs at the time excepted.)

No. 3. 3d. If the proof shows that the conductor at first sent
57 her into another car on a suspicion of her being an improper person to go into the ladies' car, and that he immediately investigated the matter, and on finding he was mistaken sent her into the ladies' car at the first station, the plaintiff cannot recover, for the conductor was entitled to reasonable time to investigate the character of those he deemed suspicious persons, and the time he took was reasonable.

(To the giving of the foregoing instruction the plaintiff at the time excepted.)

No. 4. 4th. The defendant company not having instructed or required the conductor to exclude persons of African descent or former slaves from the ladies' car, they are not liable under this stat'e for his exclusion of the plaintiff on a suspicion of her being an improper character, however unfounded that suspicion.

(To the giving of the foregoing instruction the plaintiffs at the
58 time excepted.)

No. 5. 5th. If the car into which the conductor put the plaintiff Sallie J. Robinson was as comfortable, convenient, commodious, and of the same character in its seats, material, light, &c., as the ladies' car, it was not a violation of the act of Congress of March 1st, 1875, under which this suit is brought, to require the plaintiff to go into one of these cars rather than the other.

(To the giving of the foregoing instruction the plaintiffs at the time excepted.)

After having considered of their verdict for several hours the jury came into court, not having agreed on a verdict, and requested further instructions. Whereupon the court gave them the following additional charge:

On inquiry by the jury it is further charged:

The law permits a carrier or his agent to temporarily exclude
59 persons suspected by him of being improper characters until he has a reasonable time to investigate or satisfy himself of their real character, so far as is necessary to enforce the rules of the carrier requiring good conduct of the passengers. If the exclusion assumes anything more than a temporary one for the purposes of investigation, the carrier is liable for damages at common law for wrongful suspicions, but not under this statute. Here he is only liable for excluding a person on account of color. This is a statutory offence, and it is a question of fact for the jury whether the exclusion was because of color or some other cause.

(The plaintiffs at the time objected to the foregoing instruction and excepted to the ruling of the court in giving the same.)

The plaintiffs thereupon moved the court to add to the instruction just given the following:

60 That before the defendant can justify its exclusion of the plaintiff Sallie J. from its ladys' car, on the occasion in question, on the ground that such exclusion was temporary and merely for the purpose of enabling it to investigate and ascertain whether or not she was an improper character, it must establish affirmatively by the evidence adduced that such was the character and ground of the exclusion.

But the court refused to give the said instruction so asked, and the plaintiffs excepted.

And thereupon the jury after having heard the said charge, returned into court a verdict for the defendant. And the court gave judgment and the plaintiffs thereupon moved for a new trial.

And the court overruled the motion, and the plaintiffs excepted.

And now on this the 4th day of February, A. D. 1880, a day of the same term at which the trial aforesaid was had, the plaintiffs tender
61 this their bill of exceptions in respect of all the matters aforesaid, and the same is found correct, and is signed and sealed, and is ordered to be filed, and to form a part of the record of the case, all of which is now accordingly done.

E. S. HAMMOND, [SEAL.]
*U. S. Dist. Judge, &c.*

(Endorsed:) No. 2611. Circuit court of the United States, western district of Tennessee. Richard A. Robinson and his wife Sallie J. Robinson v. Memphis and Charleston Railroad Company. Bill of exceptions. Filed February 4th, 1880. Bell W. Etheridge, clerk. W. B. Weisinger, d. c.

62 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1879, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 28th day of Jan'y, A. D. 1880, in the following cause, to wit:

RICHARD A. ROBINSON AND WIFE, SALLIE J. Robinson, plaintiff,
*vs.*
MEMPHIS AND CHARLESTON RAILROAD COMPANY, defendant.
} No. 2611.

Came again the parties in this cause, by their attorneys, and came also the jury heretofore empanneled, who, having heard the evidence, listened to the arguments of counsel and received the charge of the court, retired

to consider of their verdict, and returned into court with the following verdict: "We, the jury, find for the defendants." It is therefore con-
63 sidered by the court that the defendant recover of the plaintiffs, and their surities on the cost bond the costs of this cause, and that defendant go hence without day.

64 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial district thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1879, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 4th day of Feb., A. D. 1880, in the following cause, to wit:

RICHARD A. ROBINSON AND SALLIE J., HIS WIFE, plaintiff,
*vs.*
THE MEMPHIS AND CHARLESTON RAILROAD Company, defendant. } No. 2611.

The motion of the plaintiffs for a new trial herein was this day heard, and, being considered by the court, was overruled, and the plaintiffs excepted to the action of the court in such ruling, and the plaintiffs now bring into court their bill of exceptions in respect of the several matters which have transpired in this case, and the same being found correct, is
65 signed by the judge here presiding, and is ordered to be filed and to form a part of the record of the case, which is accordingly done.

66 UNITED STATES OF AMERICA:

To Memphis and Charleston Railroad Co., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October, 1880, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the circuit and western district of Tennessee, wherein Richard A. Robinson and Sallie J., his wife, are plaintiffs and you are defendant in error, to show cause, if there be any, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable E. S. Hammond, judge of the district court of the United States for the western district of Tennessee, this 4th day of February, 1880.

E. S. HAMMOND, *Judge.*

67 (Endorsed:) No. 2611. Circuit court of the United States, western district of Tennessee. Richard A. Robinson and Sallie J., his wife, vs. The Memphis and Charleston Railroad Company. Citation. Filed the 7th day of Feb., A. D. 1880. Bell W. Etheridge, clerk.

At Memphis, Tenn., and on 9th day of February, A. D. 1880. I served true copy hereof on S. R. Cruse, as secretary and treasurer of the within named The Memphis and Charleston Railroad Company; and at Memphis, Tenn., and on the 9th day of February, A. D. 1880, I made known the contents hereof to W. K. Poston, of Mess. Humes & Poston, counsel for the defendant herein named.

M. T. WILLIAMSON,
*U. S. Marshal, West. Dist. Tenn.*

At Memphis, Tenn., and on 9th day of February, A. D. 1880, we hereby acknowledge full and complete service of the within citation.

HUMES & POSTON,
*Counsel for the Mem. & Chas. R. R. Co.*

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the western district of Tennessee, greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court, before you, between Richard A. Robinson and Sallie J. Robinson, his wife, plaintiffs, and The Memphis and Charleston Railroad Company, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1880, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States, should be done.

Witness the Hon, Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this 4th day of February, A. D. 1880, and 104 of American Independence.

[SEAL.] BELL W. ETHERIDGE, *Clerk.*
, *D. C.*

(Indorsed:) No. 2611. Circuit court of the United States, western district of Tennessee. Rich'd A. Robinson & Sallie J., his wife, vs. The Memphis & Charleston R. R. Co. Writ of error. Issued the 7th day of Feb. A. D. 1880. Clerk, Bell W. Etheridge.

69 Supreme Court of the United States.

Know all men by these presents that we, Richard A. Robinson and Sallie J., his wife, and Fred. R. Hunt and G. E. Evans are held and firmly bound unto The Memphis and Charleston Railroad Company in the sum

of five hundred dollars, to be paid to the said obligors, their executors or administrators, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this 4th day of February, 1880.

Whereas the above named Richard A. Robinson and Sallie J., his wife, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the circuit court of the United States for the western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above named Richard A. Robinson and Sallie J., his wife, shall prosecute their said writ of error to effect, and answer all costs and damages, if any, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

R. A. ROBINSON. [SEAL.]
FRED. R. HUNT. [SEAL.]
G. E. EVANS. [SEAL.]

Acknowledged before me this 7th day of February, 1880.

BELL W. ETHERIDGE, *Clerk.*
, *D. C.*

Approved.

E. S. HAMMOND,
*U. S. Dist. Judge, &c.*

(Indorsed:) No. . Circuit court of the United States, western district of Tennessee. vs. . Appeal bond, writ of error bond to United States Supreme Court. Filed the day of , A. D. 187 . H. E. Andrews, clerk. , d. c.

70 (Endorsed:) No. 2611. Circuit court of the United States, western district of Tennessee. Richard A. Robinson and Sallie J., his wife, vs. The Memphis and Charleston Railroad Company. Writ of error bond to United States Supreme Court. Filed the 7th day of Feb., A. D. 1880. Bell W. Etheridge, clerk.

71 THE UNITED STATES OF AMERICA,
*Sixth Circuit and District of West Tennessee:*

I, Bell W. Etheridge, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect, and correct copy of the original record and proceedings in said court as the same now appears of record and upon the files in my office in the following cause, to wit:

Richard A. Robinson and Sallie J., his wife, vs. Memphis & Charleston Railroad Company. = 2611.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this 14th day of February, A. D. 1880, and of the Independence of the United States the 104th year.

[SEAL.] BELL W. ETHERIDGE, *Clerk.*
, *D. C.*

(Indorsed:) No. 2611. Circuit court of the United States, district of West Tennessee. Richard A. Robinson and Sallie J., his wife, vs. Memphis & Charleston Railroad Co.

(Indorsement on cover:) No. 217. Richard A. Robinson and Sallie J. Robinson, his wife, plaintiffs in error, vs. The Memphis and Charleston Railroad Company. W. Tennessee C. C. U. S. Filed 1st May, 1880. (Stamp:) Office Supreme Court U. S. Filed May 1, 1880. D. W. Middleton, clerk.

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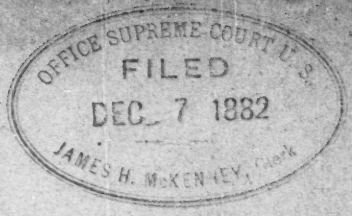


# In Supreme Court of the United States

**AT OCTOBER TERM, 1882.**

No. ~~211.~~ 28

RICHARD A. ROBINSON AND SALLIE J., his wife, *Plaintiffs in Error*,

vs.

MEMPHIS & CHARLESTON RAILROAD COMPANY, *Defendant in Error.*

## Statement of Case,

## ASSIGNMENT OF ERRORS, AND BRIEF

—OF—

**WM. M. RANDOLPH,**

*Of Counsel for Plaintiffs in Error.*

S. C. TOOF & CO., PRS. & LITHS., MEMPHIS.

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109-B

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vs.
MEMPHIS & CHARLESTON RAILROAD COMPANY, *Defendant in Error*.

## Statement of Case,

### ASSIGNMENT OF ERRORS, AND BRIEF

FOR PLAINTIFFS IN ERROR.

This is an action to recover the penalty prescribed in section 2 of the Supplementary Civil Rights Act passed by Congress March 1st, 1875.

The questions arising in the case are presented by a bill of exceptions, to be found in the record ap. pp. 7–18.

The declaration contained two counts: The first alleged in substance that the plaintiffs, who are husband and wife, were citizens of the State of Mississippi, and that the defendant, an incorporated railroad company of the State of Tennessee, was a common carrier of passengers and freight for compensation. That on the 22d of May, 1879, Mrs. Robinson, wishing to be carried from Grand Junction, Tennessee, to Lynchburg, Virginia, purchased tickets entitling her to be so transported and carried as a first-class passenger over the defendant's railway and the various

railways connecting with it between the said points, with all the rights and privileges of the other passengers traveling over the said lines of railroad. That under the act of Congress passed the 1st of March, 1875, Mrs. Robinson was "entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of any race or color, regardless of any previous condition of servitude." That being so entitled Mrs. Robinson got upon defendant's train of cars at Grand Junction, Tennessee, for the purpose of being transported to Lynchburg, Virginia, and attempted to go into the ladies' car, being the car provided for ladies and first-class passengers by the defendant, when the conductor of the train refused to admit her into the car. That in so refusing her admission to the car the conductor took Mrs. Robinson by the arm and jerked her roughly around. That by the second section of the said act of Congress any person violating the first section by denying to any citizen, except for reasons by law applicable to citizens of every race and color and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said first section enumerated, or by aiding or inciting such denial, forfeits and is required to pay $500 to the person aggrieved, to be recovered in an action of debt, with full costs. That Mrs. Robinson was excluded from the ladies' car without any legal reason, and was thereby denied the full enjoyment of the accommodations, advantages, facilities and privileges to which she was entitled by virtue of the tickets purchased by her and by the act of Congress. Wherefore she was damaged $500, and therefore the plaintiffs sue.

Record pp. 1–2.

The second count was: That the plaintiffs were born within the United States and had always been subject to

its jurisdiction and were citizens of the United States and of the State of Mississippi wherein they resided. That Mrs. Robinson was formerly held in a state of slavery, not as a punishment of crime whereof she had been convicted, but had been emancipated therefrom by law and by the Constitution of the United States. That the plaintiffs also were persons of African descent. That by reason of the premises the plaintiffs were entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of public conveyances on land and water, subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude. And being on the journey stated in the first count, and having purchased and paid for the ticket entitling her to a first-class fare or passage over the defendant's railroad as alleged in the first count, Mrs. Robinson was denied by the defendant for reasons not applicable by law to citizens of every race and color, and regardless of any previous condition of servitude, but because she was a person of African descent, the full enjoyment of the accommodations, advantages, facilities and privileges of the defendant's railroad and coaches and which the ticket held by her entitled her to, all as was more fully set forth and stated in the first count, to which reference was made.

And therefore the plaintiffs sued for $500 to be forfeited and paid by the defendant for the said offence as provided in the act of Congress.

Record p. 4.

A demurrer to the declaration was interposed (record p. 4–5), and overruled by the court. Record p. 6. Three pleas were then filed, (1) *nil debit*, and (2) not guilty, and (3) that Mrs. Robinson was not excluded from the ladies' car as she alleged. Issue was joined on all these pleas.

Record pp. 5–6.

By the Code of Tennessee, sec. 2910, "all allegations in the declaration, not denied in the plea, shall be taken as true for all the purposes of that issue."

The case was tried before a jury and a verdict was rendered for the defendant and a judgment pronounced on it.

Record pp. 7, 18–19.

The plaintiffs then moved for a new trial, and their motion was overruled, and they tendered a bill of exceptions, which was allowed and filed.

Record p. 19.

The questions now to be presented arise on the rulings of the court during the trial, and more especially in giving and refusing instructions to the jury.

## ASSIGNMENT OF ERRORS.

(1)

The court erred in ignoring the cause of action stated in the first count of the declaration, and in treating the cause of action set out in the second count as the only one to be considered by the jury.

(2)

The court erred in admitting the evidence objected to by the plaintiffs, as appears in the printed record pp. 8 and 9.

(3)

The court erred in refusing to charge the plaintiffs' instructions asked, numbered from 1 to 6, and set out in the printed record pp. 14–15, and in charging the reverse of the said instructions so asked.

(4)

The court erred in giving the five instructions, numbered from 1 to 5, asked on the part of the defendant, and in the printed record pp. 16–17.

(5)

The court erred in giving the portions of its charge to which the plaintiffs entered exceptions, to be seen in the printed record pp. 11–14.

(6)

The court erred in telling the jury that the plaintiffs could not recover in the action unless they found Mrs. Robinson was excluded from the ladies' car on account of her color.

(7)

The court erred in telling the jury that the unfounded suspicions of the defendant's conductor were a sufficient ground for excluding Mrs. Robinson from the ladies' car, and that such exclusion was not an exclusion on account of Mrs. Robinson's color, though the suspicions of the conductor for which she was excluded arose solely out of the fact that Mrs. Robinson was a colored woman, and was erroneously supposed by the conductor to be traveling with a white man.

# BRIEF.

## I.

It will be observed that the act of Congress, 18 Statutes at Large, ch. 114, p. 336, Supplement to Revised Statutes, U. S., vol. 1, p. 148, assumes in words to confer on "all persons within the jurisdiction of the United States," the full and equal enjoyment of the accommodations, advantages, facilities and privileges therein embraced, "subject only to the conditions and limitations *established by law*, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

Sec. 1.

So far, then, as persons are within the jurisdiction of the United States, whatever other right they may have thereto, they may rely upon the act of Congress as the source of their title to "the full and equal enjoyment of the accommodations, advantages, facilities and privileges" enumerated in the act, including among them those of "public conveyances on land and water." And the persons upon whom "the full and equal enjoyment" is conferred are not limited to a class or race, but are "*all persons* within the jurisdiction of the United States." And the only "conditions and limitations" that can be imposed on such "full and equal enjoyment" by the persons who derive their title from the act of Congress, are such as are "established by law." In this case Mrs. Robinson was born in the United States, and was residing in the State of Mississippi, and by the Fourteenth Amendment to the Constitution was a citizen of the United States and of the State of Mississippi. She was on a journey from Grand Junction, in Tennessee, to Lynchburg, in Virginia, and the defendant, as a common carrier of passengers between those points, sold her the ticket whereby it agreed to transport her from the one place to the other,

and the fact out of which the cause of action sued for arose, occurred while the defendant was in the assumed performance of its agreement so to carry Mrs. Robinson.

(1)

If the act of Congress bears the broad construction I have put upon it, the first question that arises is, whether Congress had the power under the Constitution to pass it. I do not propose to argue how far Congress, under the Fourteenth Amendment, may regulate commerce or travel confined to the limits of a single State and concerning only the citizens or inhabitants of that State. My case involves the rights of a citizen of one State traveling "by a public conveyance on land" through another State, for the purpose of reaching a place in a third State. I will maintain that so far as the act of Congress applies to such a case, the power to pass it is beyond question. Independently of "the power to enforce by appropriate legislation" the Fourteenth Amendment, there are, as I conceive, at least two other clauses of the Constitution on either of which the act may rest. The first is the power in Congress "to regulate commerce with foreign nations, and among the several States," article I, section 8, clause 3; and the other is the provision that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Article IV, sec. 2. These provisions, taken in connection with the grant of "all legislative powers" to Congress, article I, sec. 1, and the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and *all other powers* vested by this Constitution in the Government of the United States, or in any department or officer thereof," article I, sec. 8, clause 18, I submit leave very little room for argument.

In Prigg v. Commonwealth of Pennsylvania, 16 Peters 539, 615, etc., it was decided that where the Constitution

*guarantees* a right, Congress is empowered to pass the legislation appropriate to give effect to that right.

And see Ableman v. Booth, 21 Howard, 506.

The same principle was affirmed in the more recent case of U. S. v. Reese, 92 U. S. 214, 217, where the court said, "the form and manner of the protection may be such as Congress in the legitimate exercise of its discretion shall provide. These may be varied to meet the necessities of the particular right to be protected." It is true that in that case the words of the Chief Justice are, "rights or immunities *created by* or *dependent upon* the Constitution of the United States can be protected by Congress." But in Strauder v. West Virginia, 100 U. S. 303, 310–311, Justice Strong, delivering the opinion, quoted the language of the Chief Justice in U. S. v. Reese, quoted above, and then took pains to say: "A right or an immunity, whether *created by* the Constitution, or only *guaranteed* by it, even without any express delegation of power, may be protected by Congress."

But whether Mrs. Robinson's rights in this case were created by the Constitution or only guaranteed by it, I submit, in either event, that the act of Congress, so far as it protects them, is within the Constitution. I think this result necessarily follows from the case of Hall v. DeCuer, 95 U. S. 485. In that case the legislation involved was enacted by the State of Louisiana. It undertook, according to the opinion of the court, to fix the duties of carriers of passengers engaged in commerce between different States, and to prescribe and provide for the enforcement of the relative rights of the passengers carried. Mrs. DeCuer had been denied by Hall, the carrier, the rights the legislation attempted to confer on her, and she brought her action against him, and had a recovery in the court of original jurisdiction which was affirmed in the Supreme Court of the State. Hall prosecuted a writ of error to this court, and though Mrs. DeCuer was a citizen of Louisiana,

and was traveling *only within the State*, the court held that the legislation of Louisiana was void as in conflict with the Constitution of the United States, because Hall was engaged in carrying between different States, and the legislation was an attempt to regulate commerce between the States. The necessary inference from that decision is, that Congress exclusively had power to pass such legislation as the State of Louisiana had passed, and as the act of March 1, 1875, now under consideration, is such legislation, it must necessarily be valid.

See in this connection

Pensacola Tel. Co. v. Western Un. Tel. Co., 96 U. S. 1.

Chief Justice Taney said in the Passenger Cases, 7 Howard 422, and the court repeated the language in Crandall v. The State of Nevada, 6 Wallace, 35, 48–49: "For all the purposes for which the Federal Government was founded, we are one people, with one common country. We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it, without interruption, as freely as in our own States." Since the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, the language is true in a much broader sense than the Chief Justice intended it.

My position, in short is, that a person circumstanced as Mrs. Robinson is in this case, is "a person within the jurisdiction of the United States," within the meaning of the act of Congress of 1st March, 1875, as limited by the Constitution of the United States, and that whatever may be the effect of the act as to persons circumstanced differently, as to her it was effectual, without reference to her race, color or previous condition of servitude, to vest "the full and equal enjoyment of the accommodations, advantages, facilities and privileges" specified in the act, and to subject any person denying to her the full and equal en-

joyment of them, without a lawful excuse, to the penalty denounced.

And I do not understand that my position at all contravenes anything which has been decided by this court. In the Slaughter House Cases, 16 Wallace 36, it was held that the second clause of the Fourteenth Amendment protected from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, and that this latter class of privileges and immunities remain, with certain exceptions, under the care and subject to the regulation and control of the State governments, respectively.

The court referred to Corfield v. Coryell, 4 Washington C. C. 371; Paul v. Virginia, 8 Wallace 180, and Ward v. Maryland, 12 Wallace 430, and said generally that "the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the National Government, the provisions of the Constitution, or its laws and treaties made in pursuance thereof."

16 Wallace 74–83.

It is within the class of legislation for the protection of the privileges and immunities of citizens of the United States, generally, that I seek to bring the act of Congress now in question, so far as it affects Mrs. Robinson's rights as they are presented by this record. If I have failed to show that the act, so far as it applies to her, being a citizen of Mississippi, traveling through Tennessee to reach Virginia, is within the Constitution, without reference to her race, color or previous condition of servitude, then I confidently insist that these latter circumstances, under the provisions of the Fourteenth Amendment, render the act, so far as it has application to her case, a constitutional law.

Minor v. Happersett, 21 Wallace 162, decided that the Fourteenth Amendment to the Constitution did not confer or add to the right of suffrage of a citizen of a State, but simply furnished additional guaranty for the protection of such as the citizen already had. And U. S. v. Reese 92 U. S. 217, decided the same as to the Fifteenth Amendment. United States v. Cruikshank 92 U. S. 542, decided that the right of the people peaceably to assemble for lawful purposes, and the right to bear arms were not granted by the Constitution, but existed before and independently of it. It also decided, as in effect had been decided in the Slaughter House Cases, that the effect of the Fourteenth Amendment to the Constitution was to limit the powers of the States, but did not add anything to the power of Congress over the rights of one citizen as against another. The same principle was affirmed in Virginia v. Rives, 100 U. S. 313. Applying the principles settled in Minor v. Happersett and United States v. Reese, 92 U. S. 214, the court, in U. S. v. Cruikshank, declared that the right to vote in a State came from the State, but the right of exemption from the prohibited discriminations in the exercise of the elective franchise came from the United States. While the principle established in U. S. v. Cruikshank, and recognized in Virginia v. Rives, was fully admitted in Virginia, *ex parte* 100 U. S. 339, it was there held that Congress had power, in legislating for the purpose of giving effect to the provisions of the Fourteenth Amendment, to act directly upon the individuals who, as the officers or agents of a State, deny or impair the rights guaranteed by the Amendment. And see Neal v. Delaware, 103 U. S. 370.

I have referred to these cases only to repeat that I find nothing in them contradicting the positions I have stated.

In Munn v. Illinois, 94 U. S. 113, the following propositions were affirmed:

"Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward

each other, and, when necessary for the public good, the manner in which each shall use his own property."

"It has, in the exercise of these powers, been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc."

"When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use."

Undoubtedly, if Congress could legislate on the subject at all, its legislation by the act of 1st March, 1875, was within the principles thus announced.

(2)

It is next necessary to examine the second section of the act of Congress already referred to—18 Statutes at Large, ch. 114, p. 336, sec. 2.

It declares that any person who shall violate section 1 by denying to any citizen, "*except* for reasons *by law* applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offence forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered in an action of debt, with full costs."

Now, I observe that the penalty denounced is incurred by denying to *any citizen* "the *full enjoyment of any* of the accommodations, advantages, facilities or privileges" ennumerated in the first section, and that it is wholly immaterial whether the citizen whose rights are denied him

belongs to one race or class, or another, or is of one complexion or another. And again, the penalty follows every denial of the full enjoyment of any of the accommodations, advantages, facilities or privileges, except and unless the denial was "*for reasons by law* applicable to citizens of every race and color, and regardless of any previous condition of servitude."

In other words, the plaintiffs' case in a suit under the statute is made out by proof of the denial only, and the defendant, if he wishes to justify the denial, must allege and prove that the denial was for *some reason*, and that *such reason* was in its nature applicable to citizens of every race and color, and regardless of any previous condition of servitude, and further, that such reason was by law applicable to all such citizens.

In this connection I call attention to the phrase in section 1, "subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color," and the phrase in section 2, just referred to, "except for reasons by law applicable to citizens of every race and color," the one used in defining the rights conferred, and the other in providing a remedy for their infringement, and to suggest that the one phrase means substantially what the other does—that is to say, that in an action under sec. 2, in order to show *a reason* justifying a denial of the full enjoyment of any of the accommodations, advantages, facilities or privileges enumerated in section 1, it must be made to appear that the facts going to make up such reason constitute by law *a condition of* or *limitation upon* the right of enjoyment of the person whose enjoyment has been denied.

## II.

The first question presented in the record arises on the action of the court, admitting certain evidence offered by the defendant against the objection of the plaintiffs. The evidence was that one Reagin, the conductor at the time of excluding Mrs. Robinson, who was a young, good-looking woman, from the ladies' car, which was at night, supposed Joseph C. Robinson, a young man, her nephew, traveling with her, also colored, to be a white man traveling with her, and having been a conductor a long time, Reagin's experience as such was that when young white men traveled in company with young colored women, it was for illicit purposes, and that white men so traveling with colored women generally conducted themselves in a manner objectionable to other passengers. The evidence adduced by the defendant, in connection with that so objected to, was that the conductor saw nothing objectionable in the conduct of either Joseph C. Robinson or Mrs. Robinson, and that his only reason for supposing her to be an improper character was that she was a good-looking colored woman traveling with what he supposed to be a young white man. The conductor, Reagin, as a witness, was then asked by the counsel of the defendant how white men, traveling with colored women, generally conducted themselves, and he answered they generally laughed, and drank, and smoked, and acted disorderly. The plaintiffs objected to the question and the answer, and to all the evidence of what the conductor supposed, and of his experience, and of what white men traveling with colored women generally did, because such evidence was incompetent and irrelevant, and established no excuse or justification of the defendant's conduct towards Mrs. Robinson. But the court overruled the objection, and admitted the testimony, and the plaintiffs excepted.

Record pp. 8 and 9.

As the same arguments will apply, the questions presented by the foregoing exceptions will not be noticed separately, but will be considered in discussing the giving and refusal of instructions on the trial.

The judge told the jury:

"If you find from the evidence that at the time the admittance was denied, the conductor suspected Mrs. Robinson of being a prostitute traveling with a paramour, and required them to remain out of the ladies' car until he could investigate that matter, and immediately on finding out his mistake permitted her to occupy the ladies' car for the remainder of the journey, the company is not liable for this penalty."

Record pp. 12–13.

The jury was then told that if the plaintiff was excluded because the conductor in fact in good faith believed she was a prostitute traveling with her paramour, then whether such belief was well or ill-founded, the defendant was not liable for the penalty.

Record p. 13.

The court further instructed the jury that the defendant had the right temporarily to exclude the plaintiff on mere suspicion that she would be disagreeable in her conduct, till such time as the defendant could satisfy itself that such suspicions were ill-founded, and that if the plaintiff was excluded permanently on ill-founded suspicion, she could not recover. That the fact for the jury to determine was, whether the plaintiff was excluded because of her color, or because the conductor supposed her to be an improper character, and feared she and her companion would so conduct themselves as to annoy the other passengers, impair their comfort, or in some way injure the business of the defendant. If the plaintiff had been excluded on the former ground, she could recover, but if on the latter she could not.

Record p. 13.

And further on the judge told the jury that if they found as a matter of fact that the conductor did believe Mrs. Robinson and her nephew were improperly associated, and, therefore, improper characters, and for that belief excluded them, the defendant was not liable.

Record p. 14.

The same ideas are included in the 2nd, 3rd and 4th instructions, specially asked by the defendant and given by the court.

Record p. 17.

When the jury came back into court the judge told them that the law permitted a carrier or his agent to temporarily exclude persons suspected by him of being improper characters until he has a reasonable time to investigate or satisfy himself of their real character, so far as is necessary to enforce the rules of the carrier requiring good conduct of the passengers. And that if the exclusion was anything more than a temporary one for the purposes of investigation, the carrier was liable for damages at common law for wrongful suspicions, but not under the statute. That the defendant was liable only for excluding a person on account of color, and the question of fact for the jury was whether Mrs. Robinson was excluded because of color, or for some other cause. Record p. 17. After excepting to the instruction so given the plaintiffs asked the court to charge: That before the defendant could justify its excluding Mrs. Robinson from the ladies' car on the occasion in question on the ground that such exclusion was temporary and merely for the purpose of enabling it to investigate and ascertain whether or not she was an improper character, the evidence must establish affirmatively that such was the character and ground of the exclusion. This the court refused.

Record p. 18.

The errors committed in admitting the evidence objected to above, and in giving the instructions stated, are almost too numerous to mention.

(1)

It was error to permit evidence of the suppositions and belief of the conductor, who excluded Mrs. Robinson from the ladies' car. The defendant admitted, that as a fact, the suppositions were not true, and that the belief based on the suppositions was ill-founded. That the conductor's experience led him to the belief he formed, basing such belief on the fact he erroneously supposed to be true, that Mrs. Robinson was colored and her nephew was white, does not mend the matter. I wholly deny that the conductor's suppositions or belief were of the remotest consequence after the admission that they were not true. But, supposing the false suppositions and the unfounded belief to be matters of substance, as the district judge considered them to be, then the conductor could no more discriminate against Mrs. Robinson on account of her color, when he came to form an opinion of her chastity, than he could when he came to allow her the "full and equal enjoyment of the accommodations, advantages, facilities and privileges" guaranteed to her by the act of Congress. What is the difference between denying her "the full and equal enjoyment" because of her color, and denying the same thing to her because of a belief, that she being colored and her traveling companion white, therefore, she must necessarily be a woman wanting in virtue? In either case the substantial ground of the denial was because of Mrs. Robinson's color, which must be regarded as the proximate cause of her exclusion.

Insurance Co. v. Seaver, 19 Wallace 531.

The first instruction asked by the plaintiffs and refused by the court, was in substance that no law forbade colored women and white men traveling together, and that there was no presumption of law that improper relations existed between white men and colored women who traveled together, and if the conductor excluded Mrs. Robinson from the ladies' car because he believed she was a colored woman

traveling with a white man, then such exclusion was simply on account of race.

Record pp. 14–15.

The third of the plaintiffs' instructions, also refused by the court, carried the same proposition a little further, saying that if the conductor believed Mrs. Robinson was a colored woman, and believed her nephew was a white man, and from the fact that he supposed they were of different races, he believed they would be guilty of improper conduct, and for that reason excluded her from the ladies' car, then no reason for Mrs. Robinson's exclusion, in the sense of the act of Congress, existed, and her exclusion was on account of race.

Record p. 15.

While it is true that in Tennessee marriages between colored and white persons, and their living together as man and wife in the State, are prohibited, (Constitution of 1870, article XI, sec. 14, Acts of Tennessee of 1870, ch. 39, p. 69.) their traveling together has not been prohibited, nor their personal association. Even in the State, no presumption against the character of either party can be drawn from the fact of the association of colored and white persons, and certainly none from their traveling together. But however it may be in Tennessee, many States of the Union permit marriages between colored and white persons, and legalize their living together as husband and wife. Therefore, a National Court, in a case involving the rights of a citizen of the United States, as contradistinguished from the rights of a citizen of a State, certainly cannot recognize the principle which required the refusal of the instructions asked.

The court, in the portion of the charge to which the second exception was noted, told the jury that the sole test of the statutory offence was the defendant's motive in making the exclusion, and that the defendant was not liable unless the jury found, as a fact, that the defendant

denied the plaintiff the accommodations on account of her race, color, or previous condition of servitude.

Record p. 11.

There is the same objection to this portion of the charge as to that which was the subject of the first exception. The general words used in the body of the statute, defining the grounds of the action, are declared to mean nothing, and words which Congress employed for the purpose of qualifying or limiting the defence which the act permitted to the action it authorized to be brought, are substituted for those general words, and are made to curtail the very cause of action itself.

And, again, instead of telling the jury, as he should have done, that the question they were to try was whether the defendant had or had not excluded the plaintiff from the ladies' car, "for reasons applicable by law to citizens of every race and color," the district judge told them they were to say, as a fact, what the motive of the defendant in excluding the plaintiff was, and that upon that motive, as they found it, their verdict was to depend. The same idea that the conductor's motive was the question the jury was to try, is repeated again towards the close of the charge. Record p. 14. Now, I submit "motive," as the Judge used the word, was not the equivalent of "reason by law applicable," the phrase used in the statute. On the contrary, as other portions of the charge show, the judge referred to, and the jury must have understood him to have referred to, the personal motive or impulse prompting the action of Reagin, the conductor, who excluded Mrs. Robinson from the ladies' car, without reference to the question whether such motive or the reason furnishing the ground of Mrs. Robinson's exclusion was, or was not, one "of the conditions or limitations established by law (regarding the right to travel) and applicable (under like circumstances) to citizens of every race and color," or was or was not "a reason by law applicable to citizens (situated as

Mrs. Robinson was) of every race and color." In other words, the requirements of the statute that the defendant in order to excuse itself for excluding Mrs. Robinson from the ladies' car, must show that her exclusion was for a reason which *by law* would have been a good ground for excluding any person whomsoever, were wholly disregarded by the judge. In his opinion no reason at all was just as good as a reason founded on the law. A whim, caprice, prejudice or chimera of the mind of the conductor was equally as effectual as a justification of the defendant for the exclusion, as would have been the fact that Mrs. Robinson was afflicted with small-pox or some contagious disease. That this was so is apparent when the portion of the charge which is the subject of the third exception, is considered. There, after saying that the denial complained of must have been exclusively on account of race, color, or previous condition of servitude, the judge continued: Any other reason furnishing the motive "may be frivolous, it may be cruel, it may be aggravated wrong in its most revolting form, yet it is not actionable under this statute."

Record p. 12.

This was saying any pretense, or subterfuge, or falsehood whatever, though involving a foul and groundless imputation upon the chastity of a pure and virtuous woman, put forward as the reason for the exclusion of Mrs. Robinson from the ladies' car, so it had no reference to her race, color or previous condition of servitude, would be or might be a justification to the defendant. I submit such a construction not only ignores the purpose of the statute, but even its words, and is an insult to the intelligence of the Congress which enacted it. It is a well known fact that the passage of the act in question created much excitement, particularly in the States which formerly tolerated slavery. In Tennessee, for the purpose of counteracting its effect, an act was passed on the 24th March, 1875, within less than twenty days after the passage of the act of

Congress, which, among other things, abolished the rule of the common law requiring common carriers to carry all persons who applied to be carried, and declared that thereafter no common carrier should be obliged to carry any one, and should be at liberty to refuse to carry every one, with or without cause.

Acts of Tennessee of 1875, ch. 130, sec. 1, p. 216.

It needs no argument to prove that the act of Congress, construed as the court below construed it, is a dead letter in communities where public sentiment demands the enactment of legislation such as that enacted in Tennessee. What would be said of such a pretext as that the district judge allowed the defendant to give evidence of as the ground for the exclusion of Mrs. Robinson from the ladies' car, if sought to be made the basis of a defence to an action for excluding the wife of some distinguished white citizen? Leave Mrs. Robinson's color out of the case, and suppose the conductor had said that his experience was that when young white men traveled with young white women, it was for illicit purposes, and that young men and women so traveling generally conducted themselves in a manner objectionable to the other passengers, and that fearing or believing the wife of the distinguished white citizen supposed and her traveling companion would conduct themselves in a manner objectionable to the other passengers, he excluded her. I say, in such a case, is there a court in the country that would listen with patience to such an absurdity? And is there any difference between the case supposed and Mrs. Robinson's case, except in the fact that she is colored?

(2)

Mrs. Robinson was entitled to stand on her own character and conduct as a lady, and the fact, if true, that the conductor had come in contact with other colored women traveling with white men who had misbehaved, even though the instances had been so frequent as to impress his mind with the belief that the rule was a general one that colored

women and white men traveling together misbehaved, did not justify the conductor in excluding Mrs. Robinson from the ladies' car, and should not have been allowed to go before the jury. In the first place, Mrs. Robinson's companion was not a white man. In the second place, she was a virtuous woman and her companion was her nephew. And thirdly, neither of them misbehaved in any respect whatever. Had the conductor suspected her guilty of murder or any other crime, and had arrested her on the charge, or had excluded her from the car because of the suspicion, and she was not guilty, would any one contend that the suspicion, however well-founded in appearances, was a justification or an excuse for the act of the conductor?

(3)

I deny that the conductor of a railroad train can inquire into the chastity or virtue of women who offer themselves as passengers to be carried by the company. I deny that he can require a woman, suspected of being a prostitute, to remain out of the ladies' car until he can investigate the matter. So long as a woman behaves with propriety, I deny that the conductor has anything to do with her moral or social status. Indeed, I should go further, if necessary for my case, and submit that even if a woman be a known prostitute, she cannot, on that ground, be excluded from the ladies' car, if she behaves herself properly. In instructing the jury that the conductor, because of a suspicion he entertained of Mrs. Robinson's virtue, could exclude her from the ladies' car, the court below certainly erred.

What Judge Story said in Jencks v. Coleman, 2 Sumner 221, is to be understood with reference to the case he was considering. The exclusion in that case had not been on account of any objection to the moral or personal character of Jencks, but because he was interfering with the carrier's business. By way of argument only, the judge said a carrier is not bound to admit a passenger who is guilty of gross and vulgar habits of conduct; or who makes disturb-

ances; or whose character is doubtful or dissolute or suspicious; and *a fortiori* whose characters are unequivocally bad. In this case Mrs. Robinson was not guilty of gross or vulgar habits or conduct, nor did she make any disturbance, nor was her character doubtful or dissolute or suspicious or questionable in any respect whatever. And were I to admit the correctness of Judge Story's generalities, they would not affect her case.

In Vinton v. Railroad Co., 11 Allen 304, it was held that the conductor of a street railway car may exclude or expel therefrom a person who, by reason of intoxication or otherwise, is in such a condition as to render it reasonably certain that by act or speech he will become offensive or annoying to the other passengers therein, although he has not committed any act of offence or annoyance.

But after stating the rule, Chief Justice Bigelow laid down the qualification of it in the following language:

"The safeguard against an unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised except in cases where it can be satisfactorily proved that the condition or conduct of a person was such as to render it reasonably certain that he would occasion discomfort or annoyance to other passengers, if he was admitted into a public vehicle or allowed longer to remain within it."

11 Allen 307.

The very judge who gave the charge of which I am now complaining, in a subsequent case, declared the law to be as follows: "A railroad company may rightfully exclude from the ladies' car a female passsenger whose reputation is so notoriously bad as to furnish reasonable grounds to believe that her conduct will be offensive, or whose demeanor at the time is annoying to other passengers; but she cannot be excluded for unchastity not affecting her conduct, or furnishing reasonable ground to believe she

will misbehave herself in the car, when her demeanor at the time was lady-like and unexceptionable."

Brown v. Memphis & Ch. R. R. Co., 7 Federal Reporter 51, and same case, 5 Federal Reporter 499.

(4)

The conductor's *belief* that Mrs. Robinson was a prostitute, traveling with her paramour, when such was *not* the fact, could not have been a justification to the defendant for excluding her from the ladies' car, as the district judge told the jury it was. As already intimated, if the fact had been that Mrs. Robinson was a prostitute, and was traveling with her paramour, it is altogether probable she could not have been excluded from the ladies' car so long as there was nothing improper in his and her conduct. But, conceding this position not to be true, if she was *not* a prostitute, and was *not* traveling with her paramour, neither the conductor nor any one else, whatever his grounds of belief may have been, could exclude her from the ladies' car, or from any other right or privilege because of a contrary belief. In ordinary social intercourse, every woman is presumed virtuous. The same presumption exists in all the many relations and transactions of life where the character of women come under consideration. And the presumption of the law is the same. There is surely no reason why a different rule should prevail as to women traveling by public conveyances. Why should Mrs. Robinson's "accommodations, advantages, facilities or privileges" be made to depend on what every railroad conductor she might come in contact with from Grand Junction to Lynchburg, however ignorant, however prejudiced, however brutal, might think or believe, falsely or truly, about her private character?

But had the conductor's belief as to Mrs. Robinson's character been a sufficient ground for excluding her from the ladies' car, that ground should have been insisted on before the ticket was sold her entitling her to a seat in the

ladies' car, or, at least, before she was received on the train. After receiving her as a passenger, no discrimination against her could be made.

This principle is thus stated in Pearson v. Duane, 4 Wallace 615–616: "Although a railroad or steamboat company can properly refuse to transfer a drunken or insane man, or one whose character is bad, they cannot expel him after having admitted him as a passenger and received his fare, unless he misbehaves during the journey. Duane conducted himself properly in the boat until his expulsion was determined, and when his fare was tendered to the purser, he was entitled to the same rights as other passengers. The refusal to convey him was contrary to law, although the reason for it was a humane one. The apprehended danger mitigates the act, but affords no legal justification for it."

And in the subsequent case of Hannibal Railroad Co. v. Swift, 12 Wallace 262, the court decided that "if a common carrier of passengers and goods and merchandise has reasonable grounds for refusing to carry persons applying for passage, and their baggage and other property, he is bound to insist at the time upon such ground, if desirous of avoiding responsibility. If, not thus insisting, he receives the passengers and their baggage and other property, his liability is the same as though no ground for refusal existed."

(5)

The defendant had not the right, as the district judge instructed the jury it had, on mere suspicion that Mrs. Robinson would be disagreeable in her conduct, to exclude her till such time as the defendant could satisfy itself that such suspicions were ill-founded. It is admitted that Mrs. Robinson did not misbehave, and was not disagreeable to any body in her conduct, and it is not claimed that any reasonable ground in fact existed for the suspicion that she would be disagreeable in her conduct.

Now, upon this state of facts, the defendant had no right to exclude her from the ladies' car, or from anything else she was entitled to, either permanently or temporarily.

The conduct of the conductor in excluding Mrs. Robinson, if he did so on the ground supposed in the instruction referred to, was in the very teeth of the rule laid down by Chief Justice Bigelow in Vinton v. Railroad Co., 11 Allen 307, already quoted.

(6)

The court erred in confining the right of the plaintiffs to recover, to the case of Mrs. Robinson's exclusion from the ladies' car because she was colored. In arguing the construction of sec. 2, of the act of Congress, in a former part of this brief, attention has been called to the fact that the penalty is incurred by denying to any citizen the full enjoyment of any of the accommodations, advantages, facilities or privileges conferred by the act of Congress, and that it is wholly immaterial whether the citizen whose rights are denied belongs to one race or another, or is of one complexion or another, and to the further fact that the penalty follows every denial of the full enjoyment, unless it is made to appear that there was reason for such denial which, by law, would have been applicable to citizens of every race and color, and regardless of any previous condition of servitude. Of course, the language excludes, and was intended to exclude, from the category of reasons that might be urged for the denial of the full enjoyment, any reason based on the race, color or previous condition of servitude of the person whose full enjoyment has been denied. Now, I think it is apparent, that in a suit under the statute for the penalty, the race, color or previous condition of servitude of the plaintiff does not necessarily enter into or form a part of the plaintiff's case. His right to recover may be established and yet it may not be shown what particular race he belongs to, or what his color is, or that he was ever in a condition of servitude. It is only when the

defendant comes to make his defense that the race or color of the plaintiff is to be, or may be, considered. If he undertakes to prove a reason for denying the plaintiff the full enjoyment of the accommodations, advantages, facilities and privileges conferred by the act of Congress, he must show that such reason would, *by law*, be applicable to citizens of every race and color as well as to the plaintiff, or his reason will not be a sufficient one. Recurring to the case in hand, Mrs. Robinson's color, race, or previous condition of servitude were of importance only in testing the validity of the defence set up to her action by the defendant. If the reason relied on for her exclusion from the ladies' car, was not such that by law it would have been a good reason for excluding persons of any and every race and color from the ladies' car, then it was not a good reason for excluding her therefrom. If these positions are correct, it was manifest error to tell the jury that the plaintiffs could not recover the penalty sued for, unless they found Mrs. Robinson was excluded from the ladies' car because of her color.

By referring to the first count of the declaration it will be seen that the breach was framed on this idea. Record p. 2. It is, that Mrs. Robinson was excluded from the ladies' car without any *legal reason*. And no allusion is made in the count to the race or color of either of the plaintiffs. The defendant was left to set up the reason for the exclusion by way of defence, if it saw proper, and with the burden of proving it.

"It is a general rule of pleading that a matter which should come more properly from the other side, need not be stated. In other words, it is enough for each party to make out his own case or defence. He sufficiently substantiates the charge or answer for the purpose of pleading, if his pleading establish a *prima facie* charge or answer. He is not bound to anticipate, and, therefore, is not compelled to notice and remove, in his declaration or plea,

every possible exception, answer or objection which may exist, and with which the adversary may intend to oppose him."

1 Chitty's Pl., * p. 222.

The plaintiffs could safely rest their case on proof of Mrs. Robinson's exclusion from the ladies' car, and the absence of any reason for such exclusion. They were not required to go into the reasons that may have actuated the defendant, because they were not presumed to have known such reasons.

A well understood exception to the rule requiring proof of every fact necessary to establish a right of recovery, even though such fact involve the proof of a negative, is, "that where the subject matter of the allegation *lies peculiarly within the knowledge* of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favor." The exception applies to both civil and criminal proceedings, and the instances of its application are very numerous.

1 Taylor's Evidence, 6th edn., sections 347, 348; 7th edn., sections 376 and 377, and cases referred to.
See Apothecary Co. v. Bentley, Ryan & Moody, 159.
Morton v. Copeland, 16 Common Bench, 517.
1 Greenleaf's Evidence, sec. 79, and cases referred to.

The first exception noted to the charge is to these words: "The gravamen of the action is exclusion from the full and equal enjoyment of the accommodations on account of race, color, or previous condition of servitude. No other cause of exclusion, however wrongful or unjust, is denounced by the statute, all other causes being left for redress to such other remedies as the law may afford to the party aggrieved."

If the construction I have placed upon the statute is correct, or if the demurrer to the first count of the declar-

ation was properly overruled, this instruction is inevitably wrong. The ground of action created by the statute is not confined to exclusion from the full and equal enjoyment guaranteed by the statute on account of race, color, or previous condition of servitude. The statute does not say so, and does not mean any such thing. The statute gives the action to any citizen for the denial of the equal enjoyment, without reference to the ground of such denial, and allows the party denying to defend the action successfully only by showing that he made the denial "for a reason *by law* applicable to citizens of every race and color, and regardless of any previous condition of servitude." In other words, the plaintiff is not obliged to allege and prove the reason for his exclusion, and that such reason was within the prohibition of the statute as an element of his cause of action, but he may rest upon the simple fact of exclusion, and then the burden is upon the defendant, if he relies upon such a ground of defence, to allege and prove that the reason for which he excluded the plaintiff "was by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." If any additional argument for this construction is required, it may be found in the words of the title and preamble to the act. The title is, "An act to protect *all* citizens in their civil and legal rights." The preamble is, "Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government, in its dealings with the people, to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact fundamental principles into law: therefore." If Congress has accomplished by the act only what the district judge conceives it has, if we may judge from his charge, then the grandiloquent title and preamble are ridiculously out of place, if it may not truly be said of them that they are mere fustian.

(7)

After the district judge had told the jury that the suspicion or belief of the defendant's conductor that Mrs. Robinson was an improper character, or was a prostitute, traveling with her paramour, was sufficient reason for her exclusion from the ladies' car, the plaintiffs asked the court to tell the jury that before the defendant could justify the exclusion of Mrs. Robinson from the ladies' car, on the occasion in question, on the ground that such exclusion was temporary and merely for the purpose of enabling it to investigate and ascertain whether or not she was an improper character, the evidence must establish affirmatively that such was the character and ground of the exclusion.

The refusal to give this instruction was a disregard of one of the established rules of evidence, namely, that a defendant confessing the fact constituting the gist of the action against him, and seeking to justify or excuse it by some other fact avoiding its effect, is obliged to prove the latter fact. In England the rule has been enacted in a statute. 1 Taylor's Evidence, secs. 257 and 284 (6th edn.). Indeed, the ordinary rule requiring the party asserting the affirmative to prove it, required that the instruction as asked by the plaintiffs should have been given.

Greenleaf's Ev., sec. 74.

(8)

The fifth instruction asked for by the plaintiffs and refused by the court was, in effect, that it is no sufficient reason to impute a want of virtue to a woman of African descent that she is traveling in company with a white man in railroad cars. And the defendant's conductor was not justified by the fact that Mrs. Robinson was a colored woman, and the supposition, even if true, that her nephew was a white man, and the circumstance that the two were traveling together, in suspecting or concluding that Mrs. Robinson was a woman without virtue, or that improper

relations existed between her and him. And if the jury found from the evidence that the defendant's conductor did entertain the suspicion that improper relations existed between Mrs. Robinson and her nephew, and that such suspicion was based on the circumstance that he believed the one to be of African descent and the other to be white, then such suspicion was no sufficient reason in law for excluding Mrs. Robinson from the ladies' car of the defendant's train. And if the jury found from the evidence that the conductor excluded Mrs. Robinson from such car because of the said suspicion, they would find for the plaintiff.

Record p. 16.

The sixth instruction asked for by the plaintiff and refused by the court, Record p. 16, was intended to present the substance of the plaintiffs' case, leaving out of view the fact that she was traveling from one State to another through a third State. It was, in substance, that if Mrs. Robinson had a ticket entitling her to travel on the ladies' car, and when she attempted to go into that car, she was refused admittance and excluded by the conductor, the burden of proof was upon the defendant to show that Mrs. Robinson's right was denied her for a sufficient reason, applicable by law to citizens of every race and color; and if the defendant had failed to prove affirmatively such sufficient reason, the jury would find for the plaintiffs. And the instruction as asked added that if Mrs. Robinson was a decent person, and conducted herself with propriety, no suspicion of the conductor that she was not (the word "not" is omitted from the printed record by mistake) a virtuous woman, whether such suspicion was without foundation or was based on circumstances appearing to justify it, could warrant the conductor in refusing Mrs. Robinson admission to the ladies' car, if she had a ticket entitling her to such admission.

The fourth instruction asked by the plaintiffs and refused by the court, Record p. 15, was that if Mrs. Robin-

son was a person of African descent, and was formerly a slave, and was the wife of her co-plaintiff, and was a citizen of the State of Mississippi, and was on a journey in company with Joseph C. Robinson, also a person of African descent, from the State of Mississippi to the State of Virginia, and had purchased, and paid for, and was possessed of a ticket entitling her to a first-class passage over the defendants' railroad in the ladies' car of the train going east from Grand Junction, Tennessee, and if Mrs. Robinson attempted to get into such ladies' car at Grand Junction at the proper time and place in order to proceed on her journey, and was refused admittance into the said car, and was excluded therefrom by the conductor because he erroneously supposed Joseph C. Robinson, with whom she was traveling, was a white person, not of African descent, and supposed from the fact that Mrs. Robinson, a woman of African descent, was traveling in company with such supposed white man, that improper relations existed between them, and because of such suspicion, and for no other reason, refused admittance to and excluded Mrs. Robinson from the said car, then the jury would find for the plaintiffs.

These three instructions, I submit, presented the law of the case as the court should have charged it. They were asked separately, and the court could have given any one or more, and have refused the others. The fifth instruction had immediate reference to the suspicions of the conductor as a ground for the exclusion of Mrs. Robinson from the ladies' car. The sixth instruction related more directly to the burden of proof. The fourth insuruction was broader than the other two, and presented Mrs. Robinson's rights as a citizen of one State traveling through another to reach a third. As the questions arising upon these instructions have been discussed already, they will not be noticed further.

(9)

The fifth instruction asked for by the defendant and given by the court, was, that if the car into which the conductor put Mrs. Robinson was as comfortable, convenient, commodious, and of the same character in its seats, material, light, etc., as the ladies' car, putting her in that car was not a violation of the act of Congress.

Record p. 17.

In connection with the instruction so given, the court refused the plaintiffs' second instruction, which was to the effect that if Mrs. Robinson was excluded from the ladies' car, and such car was in any way superior to the car into which she was forced to go, then this was a denial of Mrs. Robinson's general right, and she was entitled to recover.

Record p. 15.

The word "inferior" is used in the printed record in the above instruction in place of the word "superior," but the mistake is apparent upon reading the instruction.

In giving and refusing the above instructions, the court refused effect to the express requirement of the act of Congress that Mrs. Robinson should have the "full and equal enjoyment of the accommodations, advantages, facilities and privileges" of the defendant's conveyances. It is very plain that if she was entitled to ride in the ladies' car, and desired to do so, and was refused the right and excluded therefrom against her will, that she did not have the full and equal enjoyment she was entitled to.

In Railroad Company v. Brown, 17 Wallace 445, an act of Congress declared that "no person shall be excluded from the cars on account of color." The court held that the act meant that persons of color should travel in the same cars that white ones did, and along with them in such cars; and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of

color, though they were as good as those which they assigned exclusively to white persons, and in fact the very cars which were, at certain times, assigned exclusively to white persons."

The same rule must be applied here. It is not for the courts to say Mrs. Robinson was not denied any substantial right. If she was a sensitive, intelligent woman, as she is, I do not understand how any one possessing a proper appreciation of such a woman's feelings could fail to see that Mrs. Robinson was grossly wronged and insulted by the treatment she was subjected to. But it is enough to say that the act of Congress has not commissioned the courts to exercise a discretion in determining whether persons coming within the act have had the benefit of "accommodations, advantages, facilities and privileges" *equal* to those enjoyed by other persons similarly circumstanced. The right is to "the full and equal enjoyment" of the *very same* "accommodations, advantages, facilities and privileges," and the courts no more have the power to dispense with the requirements of the act than the offending party himself has.

In Gray v. Cincinnati Southern Railroad Co., 11 Federal Reporter, p. 683, Swing, district judge, held

That "a colored lady who had purchased and held a first-class ticket, was entitled to admission into the ladies' car, if there was room for her therein; and if she was refused admission, and the railroad company declined to carry her except in the smoking car containing only men, some of whom were smoking, she had the right to decline to accept such accommodations, and it is liable to her in damages."

The doctrine of Chicago and N. W. Railroad Co. v. Williams, 55 Illinois 185, and Coger v. N. W. U. P. Co., 37 Iowa 148, is substantially the same.

And see W. C. & P. R. Co. v. Miles, 55 Penn. St. 209.

The case of Bennett v. Dutton, 10 New Hampshire 481, approved in Pearson v. Duane, 4 Wallace 615, shows that common carriers of passengers are bound to receive all who require a passage, so long as they have room, and there is no *legal excuse* for a refusal, and that they must treat all passengers alike. Such undoubtedly is the rule of the common law.

WM. M. RANDOLPH,
*Of Counsel for Plaintiffs in Error.*

MEMPHIS, TENN., November 21st, 1882.

OFFICE SUPREME COURT U.S.
FILED
JAN 30 1883
JAMES H. McKENNEY, Clerk

189-6

# Supreme Court of the United States.

**OCTOBER TERM, 1882.**

RICHARD A. ROBINSON & SALLIE J. ROBINSON,
Plaintiffs in Error,

—vs.—

MEMPHIS & CHARLESTON RAILROAD CO.,
Defendant in Error.

## Argument and Brief of Humes & Poston

FOR DEFENDANT IN ERROR.

S. C. TOOF & CO., PRS. & LITHS. MEMPHIS.

# Supreme Court of the United States.

OCTOBER TERM, 1882.

RICHARD A. ROBINSON & SALLIE J. ROBINSON,
Plaintiffs in Error,

—vs.—

MEMPHIS & CHARLESTON RAILROAD CO.,
Defendant in Error.

## ARGUMENT AND BRIEF OF HUMES & POSTON,

For Defendant in Error.

## STATEMENT OF CASE.

This is an action of debt to recover the penalty prescribed by section 2, of chapter 114, act of Congress, approved March 1st, 1875, for "denying to any citizen, except for reasons applicable by law to citizens of every race and color and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities or privileges of public conveyances by land," etc.

The undisputed facts of the case showed that the wrong complained of, was the exclusion of the plaintiff Sallie J. from the ladies' car of a train on defendant's road, and requiring her to go into the next car, where she remained for about fifteen minutes, while the train was traveling a distance of six miles, when the conductor allowed her to

go back into the ladies' car and complete her journey in that car.

It was claimed by the defendant and proved by its conductor and other corroborating witnesses that said temporary exclusion of plaintiff from the ladies' car was because he believed her to be a prostitute and her companion to be her paramour, and not because of her color, race or previous condition of servitude, and that upon discovering that he was mistaken in this belief he promptly and at once, without further application or request from her, told her that she might go back into the ladies' car, which she thereupon did. It was shown also on behalf of the defendant by the evidence of the conductor that he habitually excluded prostitutes, whether white or black, from the ladies' car.

There was no evidence whatever offered tending in the least degree to show that this exclusion from the ladies' car was because of her color, race or previous condition of servitude, unless it be the bare fact that she was a colored woman and had been previously a slave.

## ARGUMENT.

We think that upon this proof the circuit judge might well have instructed peremptorily a verdict for the defendant.

This is a highly penal law, and by well settled law to be construed strictly.

U. S. v. Wildberger, 5 Wheaton 93.
U. S. v. Morris, 14 Peters 464.

The evidence to show its violation must not only preponderate, but establish it beyond reasonable doubt.

U. S. v. Brig. Burdett, 9 Peters 682.

The case last cited was a proceeding to enforce a forfeiture of the vessel for a violation of the revenue laws. It was held that while the evidence offered on behalf of the Government aroused a strong *suspicion* that the offense was committed, yet it was not sufficient. This court said:

"The object of this prosecution against The Burdett is to enforce a forfeiture of the vessel and all that pertains to it, for a violation of a revenue law. This prosecution is a highly penal one, and the penalty should not be inflicted unless the infractions of the law shall be established beyond reasonable doubt."

The plaintiffs had the benefit of a trial where only a preponderance of the evidence was required for them to recover—yet they failed to establish even a preponderance.

We think it hardly needs argument to show that the forfeiture imposed by this act, and the misdemeanor created by it, were for refusing the equal accommodations, &c., of the carrier *because of color, race and previous condition of servitude.*

That such is the spirit of the act is clearly manifested in its title, preamble and entire body. Section 2, declaring the forfeiture, uses such apt, unambiguous words as to leave no doubt on this point; * * "denying to any citizen except for *reasons* by law applicable to citizens of every race, &c."

Under the very terms of the act the *reason* for denying the accommodations is of the essence of the offense prohibited. The 2nd assignment of errors of plaintiff insists that the court below erred in admitting evidence to show defendant's *reason* for denying plaintiff admittance to the ladies' car of its train.

This evidence was clearly competent under the very terms of the act to determine whether the denial was "for *reasons* applicable to citizens of every race," &c.

That defendant's reason for the denial or exclusion, to-wit, that he believed plaintiff a prostitute, was well or ill founded, cannot force upon defendant a reason never thought of nor acted upon, namely, to deny because of race, color, &c.

The plaintiff had the full benefit of the claim that the defense set up of believing the plaintiff a prostitute was a pretence, in the following charge of the court:

"If you find from the evidence that the conductor supposed the plaintiff an improper character because she was traveling with a man supposed at the time to be a white man, and for no other reason whatever, you may look to the facts that she is conceded to be a woman of respectable character, that her companion was in fact a colored man, and that their conduct was irreproachable, as throwing light on the question of the conductor's motive."

See record, page 14.

And the position of the defendant asserting an unfounded belief against a woman's virtue, was not calculated to impress either judge or jury favorably to defendant's cause, but rather to make them wary and willing to find that this asserted belief was a sham and pretence.

Whether, at common law, a belief or actual knowledge that a proposed passenger is a prostitute or otherwise of bad character, is, or not, sufficient grounds for a carrier to refuse admission to the ladies' car or apartments, is not here involved, and need not be discussed. The common

law remedies for such wrongs, when committed, are ample. So ample, and redressed so liberally indeed, by courts and juries where legal rights are denied because of unfounded suspicions against female virtue, as to render it extremely improbable that defendant would, in order to save the comparatively small penalty of this statute, have *untruly* set up as the reason for exclusion, what, in a common law action, would have almost inevitably resulted in a much larger judgment against it.

The charge of the judge is in a small compass, and we deem it unnecessary to discuss it, believing and insisting that it correctly expounded this act of Congress, and gave plaintiffs the benefit of all the law applicable to their case.

We think it is not necessary in this case to argue the constitutionality of the act of Congress, as, in our opinion, the case will be disposed of upon the grounds that it is not within either the letter or spirit of said act.

HUMES & POSTON,
*Counsel for Defendant in Error.*

109 U.S. 63.

# In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES
*vs.*
STANLEY.
[*Kansas.*
} No. 1.

THE UNITED STATES
*vs.*
RYAN.
[*California.*
} No. 2.

THE UNITED STATES
*vs.*
NICHOLS
[*Western Missouri.*
} No. ~~4~~ 6

THE UNITED STATES
*vs.*
HAMILTON.
[*Middle Tennessee.*
} No. ~~169~~. 204

BRIEF FOR THE UNITED STATES.

# In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES
*vs.*
STANLEY.
[*Kansas.*] } No. 1.

THE UNITED STATES
*vs.*
RYAN.
[*California.*] } No. 2.

THE UNITED STATES
*vs.*
NICHOLS.
[*Western Missouri.*] } No. 4.

THE UNITED STATES
*vs.*
HAMILTON.
[*Middle Tennessee.*] } No. 460.

## BRIEF FOR THE UNITED STATES.

These are cases of criminal proceedings for violations of the civil rights act of 1875 (below). The cases of *Stanley* and *Nichols* present *indictments* for refusing to admit colored persons into *inns;* that of *Ryan* is an *infor-*

*mation* for refusing to admit a colored person to the *parquette of a theater*, and that of *Hamilton*—an indictment for excluding a colored person from *the first-class cars of a railroad train.*

The *information* was dismissed below; the other records present certificates of division.

The Thirteenth amendment of the Constitution and so much of the Fourteenth as is applicable here, are as follows:

XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

XIV.

SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Upon the 9th of April, 1866 (14 Stat., 27), Congress enacted certain provisions in the civil rights act of that year; these, in connection with additional provisions of like nature (sections 16 and 17), were formally re-enacted by the eighteenth section of the enforcement act of May

31, 1870 (16 Stat., 144), and are now contained in sections 1977, 1978, 1979, and 5510 of the Revised Statutes, from which they are here taken:

SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

SEC. 1978. All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

SEC. 5510. Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects or causes to be subjected any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties on account of such inhabitant being an alien or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars or by imprisonment not more than one year, or by both.

The act now directly under consideration, that of March 1, 1875 (18 Stat., 335, Richardson's Supplement, 148), is as follows:

Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of

government in its dealings with the people to mete out equal and exact justice to all of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,

*Be it enacted, &c.*

[SECTION 1]. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings either under this act or the criminal law of any State. *And provided further*, That a judgment for the penalty in favor of the party aggrieved or a judgment upon an indictment shall be a bar to either prosecution respectively.

SEC. 3. That the district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offences against, and violations of, the provisions of this act; and actions for the penalty given by the preceding section may be prosecuted in the Territorial, district, or circuit courts of the United States wherever the defendant may be found without regard to the other party; and the district attorneys, marshals,

and deputy marshals of the United States, and commissioners appointed by the circuit and Territorial courts of the United States, with powers of arresting and imprisoning or bailing offenders against the laws of the United States, are hereby specially authorized and required to institute proceedings against every person who shall violate the provisions of this act, and cause him to be arrested and imprisoned and bailed, as the case may be, for trial before such court of the United States or Territorial court, as by law has cognizance of the offence, except in respect of the right of action accruing to the person aggrieved; and such district attorneys shall cause such proceedings to be prosecuted to their termination as in other cases: *Provided*, That nothing contained in this section shall be construed to deny or defeat any right of civil action accruing to any person, whether by reason of this act or otherwise; and any district attorney who shall willfully fail to institute and prosecute the proceedings herein required, shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action of debt, with full costs, and shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not less than one thousand nor more than five thousand dollars: *And provided further*, That a judgment for the penalty in favor of the party aggrieved against any such district attorney, or a judgment upon an indictment against any such district attorney, shall be a bar to either prosecution, respectively.

SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

SEC. 5. That all cases arising under the provisions of this act in the courts of the United States, shall be reviewable by the Supreme Court of the United States without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court.

It may be proper to submit here a doubt which occurs in connection with the form of proceeding in *Ryan's* case; *i. e.*, whether the above act of 1875 can be enforced by an *information*?

That act (section 2, proviso 2) gives a choice of remedy, *either* a *civil* one or a *criminal*,—*not both*.

The *form of remedy* in the former case is *expressly* given; *i. e.*, *an action of debt*. Nothing is said directly as to the form of proceeding for the misdemeanor.

But an implication may perhaps be gathered from the 2d proviso of section 3 that this proceeding also is *fixed*, and is to be *by indictment* alone. Probably Congress did not intend by the language of that proviso that a judgment for the criminal "prosecution" shall be a bar to the civil "prosecution," only when the former is *by indictment*, leaving such judgment upon *an information* unprovided for. The suggestion, on the contrary, seems to be, that *indictment is to be the only form of the criminal prosecution* under consideration; *i. e.*, that judgment upon any criminal proceeding shall be such a bar; "indictment" and "criminal proceeding" being used in the statute as equivalent.

If the form of proceeding in *Ryan's* case is inadmissible, the questions certified therein to this court, were, of course, coram non judice, so that the question as to the Federal rights of persons to seats in theaters does not now arise.

In the other cases, which concern Federal rights in *inns* and upon *railroad trains*, it seems that the proceedings are sufficient to raise the questions proposed.

In the indictment against *Stanley* the description of the party *denied* possibly may not show that he had applied to the defendant *for such accommodations as he was entitled to receive.* An innkeeper is not bound to furnish supper to all persons who demand it, but only to travelers, or at all events, to "guests. (Calye's case, 8 Co., 32, and 1 Smith Lead. cas.) [194]. It may be that as regards others he can exercise choice or caprice as to the race of persons to be admitted to his table; *i. e.*, may deny this one, and admit that.

Submitting this suggestion without more words, because the constitutional question involved there is identical with that in the case of *Nichols*, and is like that in *Hamilton's* case, the proceedings in both of which appear to be valid, I proceed to the indictment against *Nichols*, which in form is as follows:

> The grand jurors * * * present that * * * one Samuel Nichols, late of said district, was the keeper and proprietor of a public inn for the accommodation of travelers and the general public—that is to say, a certain common inn called the Nichols House * * * that one W. H. R. Agee was then and there a citizen of the United States of America and of the State of Missouri, and a person of color, and one of the Negro race, within the jurisdiction of the United States, and he, the said W. H. R. Agee, being then and there a traveler, was then and there an applicant to the said Samuel Nichols * * * for the accommodations, advantages, facilities, and privileges of said inn as a guest therein; but he, the said Samuel Nichols, then and there did deny to the said W. H. R. Agee admission as a guest in said inn, and the full and equal enjoyment by him, the said W. H. R. Agee, as such guest, of the accommoda-

tions, advantages, facilities, and privileges of said inn * * * for the sole reason that he, the said W. H. R. Agee, was a person of color and one of the Negro race, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

I premise that upon the subject of *inns* the common law is in force in Missouri, except as regards the matter [unimportant here] of *responsibility for baggage*, &c.

The only questions upon *the form* of the above indictment that have occurred to me are, (1) is it alleged that *Agee* applied for such entertainment as an innkeeper is bound to give; and (2) should it have been alleged that he *tendered pay*, or, at least, that he was *ready and willing to pay*. (Rex *vs.* Ivens, 7 C. & P., 213, Eng. ed., n.; and Fell *vs.* Knight, 8 Mees. & Welsby, 269.)

(1.) As to the first point, I submit that the allegation that *Agee* applied for the accommodations, &c., "*as a guest*" is sufficient. In this connection the term of "guest" is one *of art*, well known in law as a correlative of "innkeeper." (Norcross *vs.* Norcross, 53 Maine, 163; Fell *vs.* Knight, 8 Meeson & Welsby, 269; Walling *vs.* Peter, 23 Conn., 183; Shoecraft *vs.* Bailey, 25 Iowa, 553.) It denotes one who receives food, lodging, &c., *under the special dealing incident to innkeeping;* and, therefore, in pleading, is a sufficiently *certain* statement of all the matters which it includes. (Stephen's Plead., 354.)

(2.) As regards *tender*, &c., the denial in question was so explicit as to the grounds thereof that any tender, and, of course, allegation of tender, became unnecessary.

I come now to the principal question in this case:

Is the above act of 1875 constitutional?

This is understood to depend upon its conformity to the provisions of one or other of the *constitutional amendments* quoted above.

Several weighty judgments upon each of these amendments have been delivered by this court, and to these, as greatly facilitating the present investigation, it will be proper to advert in the first place.

In the Slaughter-house Cases (16 Wall., 36), it was held that a legislative grant by Louisiana of certain exclusive rights of slaughtering cattle within a territory of 1,154 square miles, including New Orleans, was valid as a *police regulation*, and was not within the prohibitions of either of the above amendments. In discussing this question, the Opinion of the court holds that the thirteenth amendment, although intended primarily to abolish *African* slavery, equally forbids any other form of involuntary servitude, however named; also, that the first clause of the fourteenth amendment protects against hostile State legislation such privileges and immunities only as belong to citizens of the United States *as such; ex. gr.*, such as those that arise out of the Federal Constitution, the nature and essential character of the National Government, &c.

Four justices dissented from that judgment and Opinion, and held (waiving a decision upon the thirteenth amendment) that the fourteenth amendment protects citizens of the United States against deprivation by State action of their *common rights*, meaning thereby those

privileges and immunities which of right belong to the citizens of *all free governments; ex. gr.*, that of immunity from disparaging and unequal enactments whilst in the pursuit of the ordinary avocations of life.

By Bradwell *vs.* The State (16 Wall., 130), a refusal by the supreme court of Illinois to grant a woman license to practice law, on the ground of the ineligibility of females *under the law of that State, i. e., the common law*, violated no right of the applicant under either the thirteenth or the fourteenth amendment.

The Opinion of the court affirms the above-cited argument in the Slaughter-house Cases. Concurring in the *judgment* of the court, four justices place themselves solely upon the ground that the right to practice law is not one of the immunities or privileges of women *as citizens in general.*

By Bartmeyer *vs.* Iowa (18 Wall., 129), a right to sell intoxicating liquors is not one of the privileges, &c., of citizens of the United States, or protected by the fourteenth amendment against the usual and ordinary legislation by States regulating or prohibiting such sales.

Concurring in that judgment, because such usual legislation is proper as a police regulation, three justices (a vacancy having occurred in the seat of Chief Justice Chase, one of the four *dissentients* above) again dissented from the argument of the court.

By Minor *vs.* Happersett (21 Wall., 162), the fourteenth amendment does not confer upon a *woman* a right to vote, and therefore the provision of the Illinois State constitution confining the right to vote for electors for President, &c., to *males*, is not invalid.

The Opinion goes upon the ground that such right was not coextensive with "citizenship" in the State at the

time of the adoption of the amendment, and that the latter did not *add* to the rights previously included in such citizenship.

Walker *vs.* Sauvinet (92 U. S., 90) was a case in which a licensed coffee-house keeper in New Orleans had refused refreshments to a colored person, and the latter had brought suit thereupon in a State court, under a State statute providing that, if upon the trial of such a case the jury should not agree, the same should be immediately submitted to the judge, upon the pleading and evidence already on file, whereupon he should decide the same at once.

Held, that States have a right to regulate trials in their own courts in their own way; and therefore that a jury trial, in suits at common law in such courts, is no *privilege* or *immunity* of national citizenship within the fourteenth amendment.

In United States *vs.* Reese (92 U. S., 214), it is held that an inspector of a municipal election in Kentucky was guilty of no offense against the United States for refusing to receive the vote of a citizen of the United States of African descent, on account of his race, &c., the third and fourth sections of the enforcement act of 1870, upon which the charge in question was drawn, having failed to create an offense *because of race*, &c.; as specified in the constitution, and also in the indictment.

In Kennard *vs.* Louisiana (92 U. S., 480), it is held that a State statute, providing certain speedy and peremptory proceedings to determine contests for judgeships therein, did not violate the fourteenth amendment by depriving persons of property *without due process.*

By United States *vs.* Cruikshank (92 U. S., 542), the fourteenth amendment, in *guarantying* persons against action by the States, depriving them of life, &c., without due process, or of the equal protection of the laws, does not empower the United States to enforce rights to life, &c., *generally; ex. gr.*, against infringement by private persons.

In Munn *vs.* Illinois (94 U. S., 113), it is held that a State statute regulating charges for the use of *grain elevators* does not violate the fourteenth amendment by *depriving* persons of their property, &c.; because such elevators are devoted to a public use, and so are affected with a public interest in the same way as *ferries*, *inns*, *warehouses*, &c.

The case of the Chicago, &c., Railroad Company *vs.* Iowa (94 U. S., 155), applies the same rule to a railroad company, and is followed by four other cases; (reported 94 U. S., 164, 179, 180, and 181, n.).

[In Blyew *vs.* The United States (13 Wall., 581), an indictment against *whites* for the murder of a *colored* person in Kentucky, in which the colored witnesses for the prosecution were incompetent by the State law: *Held*, that the case was not one "affecting" either the *deceased*, or the *witnesses* excluded, within the meaning of the Civil Rights act of 1866: giving jurisdiction to courts of the United States over "all causes civil and criminal *affecting persons* who are denied" certain rights.]

[By Brown *vs.* Railroad (17 Wall., 445), in a case where a train consisted of two passenger cars alike comfortable, the foremost of which upon the down trip became hindmost upon the return, a regulation that in going down the first should be set apart for colored persons and the last for whites, such use to be reversed upon the return,

was held to be a violation of an amendatory provision in the charter (A. D. 1863) "that no person shall be excluded from the cars on account of color."]

[In Hall *vs.* De Cuir (95 U. S., 485), a Louisiana statute required common carriers to make no discrimination on account of race or color as regards passengers. Thereupon the supreme court of the State, in a case where a colored person traveling from New Orleans to another place within Louisiana, upon a steamboat *which plied betwixt the former place and Vicksburg in Mississippi*, had been excluded by the captain on account of her race and color from a cabin reserved for whites, decided that the captain was amenable to the statutory penalty: *Held*, *upon error*, that such provision was a regulation of *inter-State commerce*, and therefore unconstitutional.]

In Strauder *vs.* West Virginia (100 U. S., 303), a colored man had been convicted of murder by a jury drawn under a State law which rendered colored men ineligible as jurors. Before the trial he had duly applied for removal of the case into the circuit court of the United States, and—upon this being refused,—to quash the venire, &c., because of the above legislative provisions: *Held*, *upon error*, that the fourteenth amendment entitled the prisoner to trial by a jury drawn without regard to race or color, &c.

The Opinion of the court in this case declares that although in form the fourteenth amendment is only *prohibitory*, in effect it creates *a positive immunity* for the party in whose behalf its prohibitions exist—*i. e.*, a constitutional interest in having the action of the State (through all its agencies) *undiscriminating* in respect of race, &c., and of the *protection* which it affords.

In ex parte Virginia (100 U. S., 339) it is held that

the provisions of the act of 1875 (above), making it a misdemeanor in State officers charged with any duty in selecting jurors to exclude any citizen on account of race, &c., is constitutional, and applies to the case of officers charged with that *ministerial* duty even although *in other respects* they may be State judges, entrusted with *discretion*, &c.

In Missouri *vs.* Lewis (101 U. S., 22) it is held that the fourteenth amendment, in guarantying equal protection of the laws, does not forbid or qualify the power of the States to regulate the jurisdiction of their own tribunals by *geographical lines*, as, for instance, to give an exclusive jurisdiction over appeals from certain counties to one tribunal, and over others to another, even although the latter tribunal be for certain purposes the *superior* of the former.

The court, however, *reserves*, in this connection, the consideration of any cases that may arise in which such geographical lines are resorted to for the purpose of indirectly discriminating against *races*, &c.

In Neal *vs.* Delaware (103 U. S., 370), it is held that the mere retention upon the face of State constitutions and statutes, of provisions limiting the right of suffrage to whites, that were in force before and at the time of the adoption of the fifteenth amendment, *no subsequent State legislation to like effect existing*, does not make a case of State violation of that amendment; also, that in case citizens are excluded as jurors on account of race and color by State jury commissioners, the refusal of the State court to grant a motion to quash an indictment found by such jurors, is *error* for which a judgment against the defendant will be reversed.

Upon the whole, these cases decide that—

(1.) The thirteenth amendment forbids all sorts of involuntary personal servitude (except penal) as to all sorts of men, the word servitude taking some color from the historical fact that the United States were then engaged in dealing with African slavery, as well as from the signification of the fourteenth and fifteenth amendments, which must be construed as *advancing* constitutional rights *previously existing:*

(2.) The fourteenth amendment expresses prohibitions (and consequently implies corresponding positive immunities), limiting *state action only*, including in such action, however, action by all State agencies,—executive, legislative, and judicial,—of whatsoever degree:

(3.) The fourteenth amendment warrants legislation by Congress punishing violations of the immunities thereby secured when committed by agents of States in the discharge of ministerial functions.

Referring once more to the indictment against *Nichols*, it appears—

(1.) That the right violated by him [being indeed of the same class as that violated by *Stanley* and by *Hamilton*] is *the right of locomotion.*

(2.) That in violating this *Nichols* did not act in a capacity exclusively *private*, but in one *devoted to a public use, and so affected with a public* [*State*] *interest.*

Upon behalf of the United States it is therefore submitted, also, that—

(3.) Restraint upon the right of locomotion was a well-known feature of the slavery abolished by the thirteenth amendment.

(4.) Granting that by *involuntary servitude*, as prohibited in the thirteenth amendment, is intended some *institution*, viz, custom, &c., of that sort, and not primarily mere scattered trespasses against liberty committed by private persons, yet, considering what must be the social tendency in at least large parts of the country, it is "appropriate legislation" against such an institution to forbid any action by private persons which in the light of our history may reasonably be apprehended to tend, on account of its being incidental to quasi public occupations to create an *institution*.

(5.) Therefore, the above act of 1875, in prohibiting persons from violating the rights of other persons to the full and equal enjoyment of the accommodations of inns and public conveyances for any reason turning merely upon the race or color of the latter, *partakes of the specific character of certain contemporaneous solemn and effective action by the United States to which it was a sequel*—and is constitutional.

Discussing these topics in the order named:

1. It seems obvious that "the power of locomotion," mentioned by Blackstone (Book 1, chap. 1), is a power which draws to itself all corresponding "facilities" which being from time to time devised by human ingenuity are progressively taken up amongst the *common* needs and *common* rights of any existing generation. To make use of language employed by the court in the Telegraph Company case, 96 U. S., p. 9: this *personal* power, like the powers of government there referred to, keeps pace with the progress of this country and adapts itself to

the new developments of time and circumstances, appropriating all new agencies successfully brought into use to meet the demands of increasing population and wealth. Its earliest illustrations may have been only such as relieved persons from confinement within four walls, or established that freemen were not adscripti glebae, appendages to manors or districts of country; but successively, beginning in common-law countries before the memory of man, it has vindicated the right of everybody to the *highway*, to the use of inns, and more lately to that of *passenger carriers*, and it stands ready to advance along the path of civilization and appropriate from time to time whatever of that sort human ingenuity may devise, and common sense may pronounce to be *an advantage which must be made common to all, or otherwise the "pursuit of happiness" will degenerate into a monopoly.*

I submit, therefore, that in accordance with a general law of progressive civilization, to the effect that the luxuries of one generation become the necessities of the next, the right to use an inn or a train of cars (certain reasonable conditions common to everybody being observed), is one of the rights of locomotion, and therefore a high constitutional right.

In the passage already referred to, Blackstone speaks as follows:

> Next to personal security the law of England regards, protects, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article [Personal Security]; that it is a right strictly natural; that the laws of England do not assume to abridge

it without sufficient cause; and that in this Kingdom it cannot ever be abridged without the express permission of the laws. (Book 1, ch.1.)

It is true that, in discussing this proposition, Blackstone does not refer to the topic now under discussion, turning attention mainly to topics in connection with the writ of *habeas corpus*. Considering the state of travel one hundred years ago and before, this may be accounted for upon other grounds than by supposing that such topic was not meant to be included.

Hundreds of thousands of persons are probably at every moment of time *travelers* at some point or other within the United States. In course of the year probably *billions* of passengers make use of public conveyances here. The American Almanac for the year shows that by late returns 600 millions of passengers used conveyance by railway trains alone in Great Britain during a year; whilst in the State of New York the number of *passenger-miles* traveled by trains was more than a billion. The development occasioned during the century by a revolution in manners thus glanced at has occasioned perhaps the principal cotemporaneous expansion of jurisprudence. Attempts to digest the rights and powers of certain artificial persons created in the same connection into a system that shall not conflict with the constitutional rights of natural persons, has, in the mean time, become one of the chief troublers of the thoughts of statesmen—on the bench, in the legislature, and in the closet.

If Blackstone had written a century later, the chapter in question would no doubt have had illustrations and speculations pertinent to "the power of locomotion" more appropriate to the present topic; but as things

have turned out, the duty of filling up a part of the picture may have been devolved upon this court.

(2.) The circumstance that in violating *Agee's* right of locomotion *Nichols* did not act in a capacity exclusively private, but in one devoted *to a public use, and so affected with a public* [State] *interest*, seems proper to be mentioned here. The phrase here employed will be recognized as taken from the *Elevator* cases, in 94 United States, already cited.

It is submitted that if State law appropriates inns to public use, then innkeepers, being persons invested with the duty of distributing this use, possess to a certain extent the character of public officers, *i. e.*, officers or agents of the State. So that if they obstruct in practice that enjoyment of which by law they are the ministers, inasmuch as in the nature of the case such obstruction is practically privation of the rights (there being no way in which a *remedy in specie* can be administered), the allegations in this indictment make a case directly under the fourteenth amendment.

I submit this view, although it is to be admitted that the statute of 1875 does not limit its action to agents of the State, and may not be susceptible of division into parts, any one of which has such limitation. If so, the government here is confined to a contention that the legislature, in dealing about *institutions*, or *action* forbidden *to States*, can forbid any action by private persons *which may reasonably be apprehended as tending to such institution or action.*

It is in such matters that courts will probably be most reluctant to interfere with the legislature. The faculty

required to pass upon the situation being so peculiarly *legislative*, as distinguished from judicial, that a court, impressed otherwise with the wisdom of the maxim *obsta principiis*, would probably be more than ordinarily disposed to solve every doubt in favor of the law.

I come now to discuss more expressly the *Federal questions involved* in these cases.

(3.) Restraint upon the rights of locomotion was a characteristic feature of the particular form of slavery abolished by the thirteenth amendment.

Under either of the two theories suggested in the Opinions in the Slaughter-house cases, and traceable subsequently in the reports of the decisions of this court, the establishment of this proposition would render plainly unconstitutional any *State action* authorizing the action reprobated by this indictment; and therefore, as I have already submitted, would warrant, and even *demand*, legislation by Congress having in view the suppression of action *by anybody* which reasonably tends to bring about such State action.

It seems unnecessary to elaborate this point. It is, as has been said by this court in another connection, "too recent to be history,"—that a first requisite of the right to appropriate the use of another man was to become the master of his natural power of motion, and, by a mayhem therein of the common law, to require the whole community to be *upon the alert* in aiding the master to restrain that power. By a travesty upon ordinary

and constitutional modes of speech, "locomotion" became—"running away"; and "entertainment,"—"harboring." This incident was of the very essence of the institution. Every slave State was compelled to enforce it by statutes progressively more and more stringent—striving thereby to meet a tide of hostility to the institution that was rising from year to y ear under, amongst other matters, the powerful influence of *locomotive machinery and steam*. This legislation was treated by the courts as *remedial*, and therefore to be interpreted with favor. The State Reports present many cases to this general purpose.

In the State of Missouri, from which the case of *Nichols* comes, we have in the year 1846 the case of *Eaton s. Vaughan* (9 *Missouri*, 734), the head-note to which is as follows:

> In an action of trespass against the captain of a steamboat for taking away a slave on his boat, it is not necessary to show that he knew the person to be a slave.
>
> 2. Ordinary diligence used in attempting to ascertain if he were a slave is no justification to the person carrying the slave away.

The facts of that case are too elaborate to be inserted here. But it appeared that the runaway had *free papers*, to *the description* in which he bore resemblance, and which were shown to the *captain* to be genuine, before the slave (a mulatto) was received. Suspicion having arisen the man was examined several times during the voyage the result being a conviction that he was the person represented in the free papers.

The court said:

> Every negro [overruling in this connection a suggestion that, as held in several other States in this respect, there was a distinction betwixt *pure* and *mixed* blooded persons: the runaway in question being of the latter sort] asserting his right to freedom is presumed

a slave, and it devolves on him to show his right to the condition which he claims. It is true that slaves have volition; they may leave the service of their masters, and may impose themselves on others for free men, but it is necessary for the security of the owners of such property that they who treat them as such should do it at their peril.

The court below having instructed the jury that they might give smart money, the Supreme Court said that it was a mistake so to charge, but that as there were expenses in endeavoring to recover him, the excess of damages was not so great as to warrant them in setting the verdict aside. They add:

We do not feel assured, all things considered, that such a course would ultimately prove an advantage to the defendant. There is nothing in this transaction which throws the least suspicion upon the purity of Capt. Eaton's conduct. That some diligence was employed by him cannot be denied, but that a greater degree of diligence would in all probability have prevented the loss to the plaintiff candor compels us to avow. We think that the hope of making his escape on the boat manifestly induced the slave to run away. The facility of escaping on the boats navigating our waters will induce many slaves to leave the service of their masters. Their ingenuity will be exerted to invent means of eluding the vigilance of captains, and many ways will be employed to get off unnoticed. One escape by such means will stimulate others to make the attempt. The greater portion of our eastern frontier, being only separated by a navigable stream from a non-slaveholding State, inhabited by many who are anxious, and leaving no stone unturned to deprive us of our slaves, our interior being drained by large water-courses, by means of which its commerce in steamboats is maintained with the city on our frontier, render it necessary that the strictest diligence should be exacted from all those navigating steamboats on our waters, in order to prevent the escape of our slaves. Our citizens, aware of the circumstances by which they are surrounded, will not weigh in golden scales the damages that may result to the owners of slaves from a relaxation of that

degree of diligence which is necessary to secure them against losses. This determination they will carry with them in their jury rooms, and it is not for the courts to weaken or destroy the force of a determination necessary to protect a species of property which, whether for weal or for woe, has been entailed upon us by those who are now making the most clamor about it.

I call attention to this passage as a temperate expression of the law as received in the States in which slavery prevailed.

Inasmuch, then, as in times of slavery legislation like the act of 1875 would have touched that institution at the quick, its *specific* relation thereto can readily be recognized.

(4.) I now submit that, granting that by "involuntary servitude" as prohibited in the Thirteenth Amendment, is intended some *institution* of that sort, and, primarily at least, *not* mere scattered trespasses against personal liberty committed by private persons, yet, it is "appropriate legislation," under the second section of that Amendment to forbid any action by private persons which a legislature, in view of history or otherwise, may reasonably apprehend as threatening to result in State recognition of such an institution.

It seems that the circumstance that the sort of action forbidden by the act of 1875 is action *in the course of certain business transacted with the public* makes a substantial difference as regards such action and *crimes against life and liberty*, such as were before this court in Cruikshank's case, and as to which it is said (92 U. S., p. 553, bottom): "It is no more the duty or within the power of the United States to punish for a conspiracy, to falsely imprison or murder within a State, than it

would be to punish for false imprisonment or murder itself." There is no reason to apprehend that acts of mere violence may become a political institution. But as regards innkeepers and passenger carriers, whose conduct is so much *a mere reflection of the views of the community*, it is probably otherwise. The action of such persons testifies to, and at the same tends to enlarge, a particular current in *public opinion*, and this in its turn is fruitful of *public, i. e., State* institutions.

*Is it not a mere matter of legislative discretion to decide upon the stage of growths at which it will be best to suppress such vegetation?*

The significancy of the action of *Nichols* is that it is *representative*. It shows not only his private views as to accommodating this race in inns, &c., but the views of whole communities of citizens, upon whom their history has naturally imposed these views.

Congress has taken notice of this, and courts *also* will take notice of it, or, at all events, will admit that notice thereof may well be within the reach of *legislative* organs of perception, and therefore is a matter not to be criticised by themselves. It is to notice so taken by Congress that the preamble of the statute of 1875 indirectly refers. I submit that the phenomenon thus indicated points not remotely to a birth of corresponding State institutions, and that it is in the interest of national peace and good feeling to nip such institutions in the bud.

(5.) It follows that the act of 1875 is constitutional in the feature now in question.

I will add in this connection no more than that in some points of view it will be an extraordinary result

if that feature shall be found to be unconstitutional; for therein it conforms to a series of acts (as above), which began in 1866, and has received the express sanction of Congress upon four different occasions during nine years, some of the concurring members of that body at the same time being not only distinguished as constitutional lawyers, but being also persons who were in public life contemporaneously with the whole contest, in war and subsequent peace, which ended in destroying slavery; and were also active parties in considering and settling the particular terms of the constitutional provisions under which they afterwards legislated. If in respect to a great feature like this, to wit, repressing all action *by persons* that savors of an enforcement of odious characteristics of the slavery which they have met, vanquished, and abolished, they have erred fundamentally time and again during years, it is, I submit, a circumstance much to be wondered at.

In the mean time it may be believed that their Statutes are in accordance with their Amendments and with the logic of the Events of the war which they supported; that they have been right in apprehending that every rootlet of slavery has an individual vitality, and, to its minutest hair, should be anxiously followed and plucked up; and that as to scattered disparagements of persons on account of race and color, incidental to certain public callings, and by persons who notably are sensitive registers of local public opinion, the epigrammatic proposition of Junius is applicable, to wit, that what upon yesterday was only "fact" will become "doctrine" tomorrow.

S. F. PHILLIPS,
*Solicitor-General.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1880.

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UNITED STATES
*v.*
JAMES HAMILTON. } No. 1110.

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MOTION TO ADVANCE.

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This is a criminal prosecution under "the civil rights act" of March 1, 1875, for denying to a person of color the equal privileges of a public railroad conveyance. It differs from those heretofore submitted in that the railroad is a channel of inter-State commerce, subject to Congressional legislation. That it may be decided with the analogous cases, the Attorney-General asks to have it advanced and heard when No. 144, Taylor *v.* Maryland, involving similar questions, is reached. The defendant in the present case is defended by Hon. E. H. East, of Nashville, Tenn., who has been notified of this motion.

CHARLES DEVENS,
*Attorney-General.*